

# **Does Testing = Race Discrimination?: *Ricci*, the Bar Exam, the LSAT, and the Challenge to Learning**

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## **ABSTRACT**

Aptitude and achievement tests have been under heavy attack in the courts and in academic literature for at least forty years. *Griggs v. Duke Power* (1971) and *Ricci v. DeStefano* (2009) are the most important judicial battle sites. In those cases, the Supreme Court decided the circumstances under which a test could be used by an employer to screen employees for promotion when the test had a negative racial impact on test takers.

The related battles over testing for entry into the legal academy and from the academy into the legal profession have been no less fierce. The assault on testing is founded on an amalgam of postmodernist, industrial organizational, and diversity theory. Leading the charge is the Society of American Law Teachers, which rightly claims that the LSAT, bar exam, and related law school accreditation standards have the effect of disproportionately keeping minorities out of the profession.

But if these tests do measure something useful and are abandoned, there will be consequences—and these are often ignored. They will affect not only parties vying for admissions and jobs but the nation as a whole.

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*“[Merit for a] fire supervisor . . . must mean the ability to effectively lead. This is a ‘reflection of character, integrity, and command constructs that do not lend themselves to written ‘job knowledge’ tests . . . . [J]ob knowledge is only a small part of the job performance domain.’”<sup>1</sup>*

*Professor Mark S. Brodin*

*“So what you’re saying is that what counts is race above all?”<sup>2</sup>*

*Justice Anthony Kennedy*

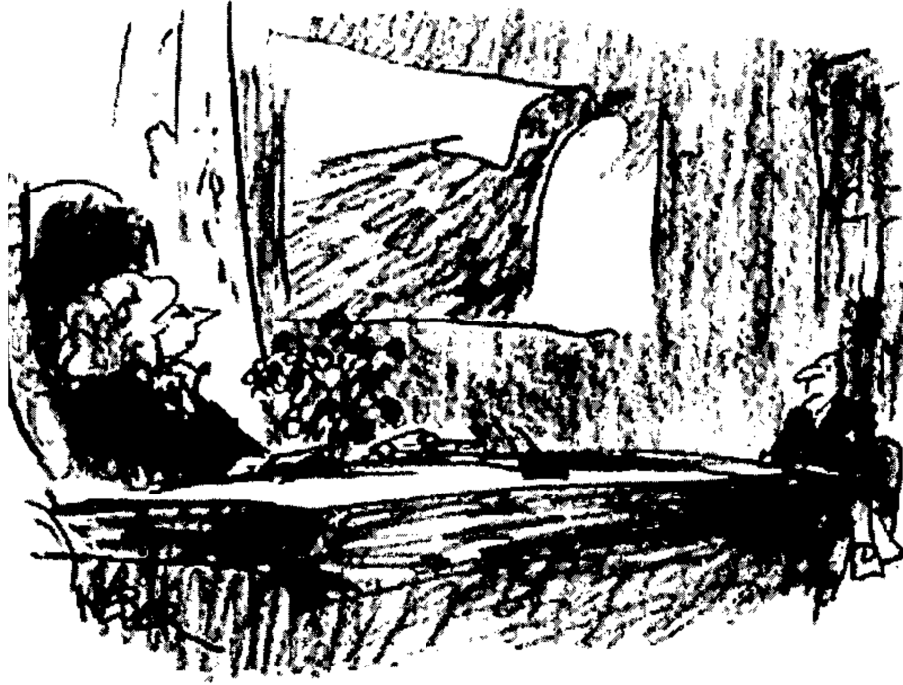
## I. INTRODUCTION

Are tests of learning useful to employers, educational institutions, and the public at large? Or do they serve mostly as a cover for perpetuating the power of the powers that be? If the latter, the implications are clear: tests must be abandoned. But what if tests of knowledge and learning such as the bar examination and the LSAT measure something valuable? Do resulting racial disparities nevertheless argue for limiting their use? What, if any, are the costs of ignoring these disparities?

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<sup>1</sup> Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case and the Triumph of White Privilege*, 20 S. CAL. REV. OF L. & SOC. JUSTICE 161, 229 (2011) (quoting in part the Brief for International Association of Black Firefighters et al. as Amici Curiae Supporting Respondents, at 13, in *Ricci v. DeStefano*, 557 U.S. 557 (2009) (No. 07-1428)).

<sup>2</sup> Transcript of Oral Argument at 11, *Fisher v. U. of Texas at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345).



*“You seem to know something about law.  
I like that in an attorney.”*

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Let me begin a response to the touchy subject matter of this Article, indirectly, with a story that inspired this entire endeavor.<sup>3</sup> The 1936 Olympic Games held in Berlin were to be a showcase for a resurgent Germany under the leadership of Adolph Hitler.<sup>4</sup> Accordingly, the country went all out to promote the manifold

<sup>3</sup> See Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413, 2415 (1989) (“Stories . . . and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings [in our] political and legal discourse . . . . They can show what we believe is ridiculous, self-serving or cruel.”). Charles Lawrence III, *The Word and the River, Pedagogy as Scholarship and Struggle*, 65 S. CAL. L. REV. 2231, 2281 (1992) (“We must ‘flood the market with our stories.’ . . . Only as these rich and varied stories are increasingly heard will we begin to shape a new public discourse” (quoting in part Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988))).

<sup>4</sup> See DAVID CLAY LARGE, NAZI GAMES: THE OLYMPICS OF 1936, 152–57 (2007).

blessings of National Socialism.<sup>5</sup> Spectacular new structures sprouted; Fascist Berlin was polished clean of rust, dust, and even anti-Semitic graffiti; and German athletes were trained physically and psychologically as never before.<sup>6</sup> The preparation must have paid off beyond Nazi dreams, because (little) Germany won far more medals, including golds, than any other country.<sup>7</sup>

Yet a dark cloud must have hung over the games for the Reich. On the second day, some high profile track and field events were scheduled, and Americans of African descent were competing.<sup>8</sup> This, it turned out, was Jesse Owens' banner year; training harder than ever for competitions that frontally challenged his racial pride, he proceeded to win four gold medals, setting two individual world records in the process.<sup>9</sup>

As a boy in the 1950s, I remember the exact moment I was told that the Aryan supremacist-in-chief, who was sitting in his box, had snubbed Owens after his first victory. I exulted at the news—anything to stick it to Adolf Hitler, whose death put him safely beyond the power of my rage.

A few weeks before I began to write this Article, I read to my chagrin that my joy had been unfounded. Owens' triumph was indeed mythic but, whatever the Fuehrer's other anti-social qualities, the Snub was merely mythical.<sup>10</sup> Some people at the time, seeking the same

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<sup>5</sup> See *id.* at 165–67.

<sup>6</sup> See *id.* at 184.

<sup>7</sup> Germany won 33 golds and a total of 89 medals, compared with the United States at 24 and 56 respectively. See ORGANIZING COMMITTEE FOR THE XI OLYMPICS BERLIN 1936 E.V., THE OLYMPIC GAMES: BERLIN, 1936: OFFICIAL REPORT (Friedrich Richter ed., 1937), <http://www.la84foundation.org/6oic/officialreports/1936/1936v2sum.pdf> (last visited July 22, 2012). See also *Olympic Medal Table*, THE TELEGRAPH, <http://www.telegraph.co.uk/sport/olympics/8660580/Olympic-Medal-Table.html> (last visited Apr. 4, 2013).

<sup>8</sup> Black track and field athletes were so good that columnists Westbrook Pegler and Fred Farrell predicted American dominance. See JEREMY SCHAAP, TRIUMPH: THE UNTOLD STORY OF JESSE OWENS AND HITLER'S OLYMPICS 133, 155 (2007).

<sup>9</sup> Owens won gold medals in the 100 meter, 200 meter, broad jump, and relay. His world records were in the 200 meter and broad jump. *Id.* at 5–10, 217, 225, 228 (2007). Mack Robinson, Jackie Robinson's older brother, took the silver in the 200 meter. See LARGE, *supra* note 4, at 238. A number of other African Americans also medaled. See WILLIAM J. BAKER, JESSE OWENS: AN AMERICAN LIFE 94, 100 (Free Press 1986).

<sup>10</sup> See LARGE, *supra* note 4, at 192–95. A recent biopic, *American Experience: Jesse Owens* that aired on PBS on May 1, 2012, however, plays up the “snub.”

satisfactions as I later would, had set out to slander Hitler and perhaps even to provoke a war. The Fuehrer was apparently not personally greeting athletes that day and may have even smiled or waved at Owens.<sup>11</sup> In fact, Owens, who had learned a thing or two about being snubbed while at Ohio State University,<sup>12</sup> himself absolved the Nazi leader: “Hitler did not snub me—it was our president [FDR] who snubbed me. The president didn’t even send me a telegram.”<sup>13</sup>

What anguish as it looked like I had lost the hook for this Article that had long before snagged *me*. Luckily, my subsequent research showed, the Owens/Hitler story contained enough truth that *it* could not be snubbed. The point is that Hitler was disposed to dismiss Owens. When asked at the time whether he would have congratulated Owens, for example, the Fuehrer said, “I would never have shaken this Negro’s hand.”<sup>14</sup> When asked to be photographed with Owens, Hitler screamed, “Do you really think I’d allow myself to be photographed shaking hands with a Negro?”<sup>15</sup>

Is there a real connection between the story of Jesse Owens’ dazzling athletic feat and the subject of this essay: race, testing, and the challenge to learning in contemporary America? Or does this question only invoke stale discussion about the absence of affirmative action in the National Basketball League? Put more robustly, is there a way of getting beyond the mind/body dualism by tying a foot race to a test of mastery of a knowledge domain, where a photo finish cannot put questions of indeterminacy to rest? For insight into these questions, consider another story that shook me, that of *Ricci v. DeStefano*,<sup>16</sup> the much-debated 2009 Supreme Court Title VII case.<sup>17</sup>

<sup>11</sup> See LARGE, *supra* note 4, at 192–95.

<sup>12</sup> See BAKER, *supra* note 9, at 38–39 (reporting that Owens and his black teammates were not allowed into restaurants along High Street, near the university).

<sup>13</sup> See SCHAAP, *supra* note 8, at 211 (citing a United Press release October 16, 1936). Owens apparently was never invited to the White House either. I have been unable to determine whether FDR sent telegrams to any of the American medal winners.

<sup>14</sup> See LARGE, *supra* note 4, at 233 (quoting Adolf Hitler).

<sup>15</sup> *Id.* at 244. For Hitler, moreover, “The Americans should have been ashamed of themselves for allowing their medals to be won by Negroes.” *Id.* They were unworthy of acclaim in an event highlighting progress in human and especially Nazi civilization. *Id.* Hitler reportedly believed that blacks were at an advantage because of their “jungle inheritance” and that they should not be allowed to compete in future Olympics. *Id.* (citing Albert Speer).

<sup>16</sup> 557 U.S. 557 (2009).

In *Ricci*, the City of New Haven had contracted with an industrial organization firm to provide a test to determine who was best qualified to be promoted in its Fire Department.<sup>18</sup> After evaluating the test, the City administered it to firefighters.<sup>19</sup> Like Owens, and knowing that competition would be keen and that preparation was essential, Frank Ricci, a white firefighter, and Benjamin Vargas, a Hispanic colleague, prepared hard for the test; they also went to considerable expense.<sup>20</sup> Earning the highest scores, they, six other whites, and another Hispanic became eligible under prevailing rules for the promotions.<sup>21</sup> At this point not only were the winning firefighters *snubbed*, New Haven *voided* the test results.<sup>22</sup> Competitors would have to go back to their starting blocks and take a more valid test, one presumably that produced winners reflecting the racial composition of the New Haven community, then 37% black.<sup>23</sup> New Haven, one might say, had moved the finish line to disqualify the winners. And it clearly did so, as the Supreme Court later held, “because of race,”<sup>24</sup> a conclusion that caused the Court to overturn the decision<sup>25</sup> and order promotion of the plaintiffs.<sup>26</sup>

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<sup>17</sup> See Justin Driver, *Recognizing Race*, 112 COL. L. REV. 404, 405 (2012) (“Few legal disputes have garnered more attention in recent years than *Ricci v. DeStefano*.”).

<sup>18</sup> *Ricci*, 557 U.S. at 564.

<sup>19</sup> See *id.* at 565 (“The city administered the test in November and December of 2003.”).

<sup>20</sup> *Id.* at 607 (Alito, J. concurring). As for Owens’ “ceaseless regimen of training,” before the Olympic Games, see SCHAAP, *supra* note 8, at 116.

<sup>21</sup> *Ricci*, 557 U.S. at 566.

<sup>22</sup> *Id.* at 574 (“With one member recused, the CSB deadlocked 2 to 2, resulting in a decision not to certify the results.”).

<sup>23</sup> See CITY OF NEW HAVEN, DEMOGRAPHICS 22 (2000), [http://www.cityofnewhaven.com/cityplan/pdfs/PlanningPrograms/ComprehensivePlan/Web\\_Data\\_Book/Demographics.pdf](http://www.cityofnewhaven.com/cityplan/pdfs/PlanningPrograms/ComprehensivePlan/Web_Data_Book/Demographics.pdf) (demonstrating that as of the 2000 U.S. census, Blacks or African Americans made up 37.4% of the New Haven population).

<sup>24</sup> *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009).

<sup>25</sup> *Id.* at 593.

<sup>26</sup> The plaintiffs also won back pay. See Edmond H. Mahoney, *New Haven Firefighters to Get \$2 Million in Discrimination Lawsuit: City Also Agrees to Pay Enhanced Pension Benefits*, THE HARTFORD COURANT (July 28, 2011), [http://articles.courant.com/2011-07-28/news/hc—newhaven-firefighters-0729-20110728\\_1\\_white-firefighters-new-haven-frank-ricci](http://articles.courant.com/2011-07-28/news/hc—newhaven-firefighters-0729-20110728_1_white-firefighters-new-haven-frank-ricci).

Also like the “Hitler-Owens snub,” *Ricci* has received far more than its share of hype, a consequence suggesting that racial competition is still so psychologically fraught that readers in this area must be on their guard. “*Ricci*,” wrote two well-known bloggers, “decided who gets the good jobs in cities across America.”<sup>27</sup> Anticipating losing the case, the Greater New Haven NAACP president charged that the “Supreme Court . . . [i]s looking for an opportunity to roll back the advances the NAACP has made over the past 100 years.”<sup>28</sup> When Mr. Ricci hypothesized that the black firefighters’ test scores resulted from their failure to study hard enough, the “insult,” writes law professor James Brodin, “merely serves to buttress many white firefighters’ false sense of superiority, reinforcing classic examples of debasing stereotypes that African-Americans are just ‘dumb’ or ‘lazy.’”<sup>29</sup> *Ricci*, in short, was a symbol of “the triumph of white privilege.”<sup>30</sup>

*Ricci* is especially important to us here because of New Haven’s position that in order to produce black winners it was free to ignore the results on a test *it* adopted and thereby subvert a principle of fundamental fairness or, in popular parlance, fair play. However much we may all agree that racial disproportion is a serious and deep-rooted problem in America, New Haven’s action implies that racial balance is the axis on which our system of justice must turn.<sup>31</sup> In this racist view, Frank Ricci’s legal and moral claims are but centrifugal dust.<sup>32</sup>

<sup>27</sup> See Brodin, *supra* note 1, at 163 (quoting Nicole Allan & Emily Bazelon, *The Ladder*, SLATE MAG. (June 25, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/features/2009/the\\_ladder/part\\_1\\_a\\_connecticut\\_citys\\_race\\_problem\\_sparks\\_a\\_national\\_debate](http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_1_a_connecticut_citys_race_problem_sparks_a_national_debate)).

<sup>28</sup> Randall Beach, *NAACP Decries Firefighters’ Reverse Bias Case*, NEW HAVEN REGISTER (Jan. 16, 2009), <http://www.nhregister.com/articles/2009/01/16/news/doc49706e685b4d8653513133.txt> (quoting Greater New Haven NAACP President James Rawlings). For the NAACP Legal Defense Fund, the case “required employers to maintain employment practices that perpetuate discrimination against minorities.” *Id.* (emphasis added).

<sup>29</sup> See Brodin, *supra* note 1, at 203 (quoting Brief for International Association of Black Firefighters et al. at 21, 33–34). What explanations could Mr. Ricci have offered that would not have insulted the law professor? That the minority candidates were afraid of the challenge? That they were too cocky? That they were, for one reason or another, less able? And of course if inadequate study was the culprit, there is no disparagement of native intelligence. The best response by a white competitor, this story teaches, is to keep mum.

<sup>30</sup> See *id.*

<sup>31</sup> A colleague’s objection to the opening paragraph of this essay is relevant here. He would have asked, he tells me, “How could New Haven construct a



Without the faintest desire to impeach Mayor DeStefano for racial prejudice against the white firefighters, can we gain even more insight from juxtaposing the Owens and Ricci stories? If New Haven was right, was Hitler also right? Was the German state entitled to its own ideas of racial equity? For Hitler, after all, a track event was not only

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firefighter promotion system that had some relationship to job duties while not disenfranchising a substantial portion of its minority population?” New Haven presumably asked the same question (after administering the test). The problem with this reformulation is that it puts the needs of the minority firefighters first, not those of the city. It turns promotions into a political matter. This essay examines the implications of such a policy.

- <sup>32</sup> See RUSSELL K. NIEL, WOUNDS THAT WILL NOT HEAL 33 (2012) (quoting Professor Mary Frances Berry, former Chairwoman of the U.S. Civil Rights Commission: “Civil rights laws were not passed to protect the rights of white men and do not apply to them.”); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 169–70 (2008) (stating that applying different standards for different racial groups is not wrong when such action is not demeaning; since white males have the power, they cannot be demeaned and thus have no cognizable gripe). When preferences are less than total, as they often are, they can fly beneath radar screens. Here is a sample of those situations unexpectedly uncovered in research for this Article: (1) New York University Law School now has a diversity policy for acceptance to its staff of law review editors. See Law Review, *Commitment to Staff Diversity*, [http://www.law.nyu.edu/print/ecm\\_dlv\\_015129?superheader=ecm\\_dlv\\_015127](http://www.law.nyu.edu/print/ecm_dlv_015129?superheader=ecm_dlv_015127) (last visited Mar. 10, 2013); (2) employers can now be found in violation of Title VII if, when they fail to hire job applicants with criminal convictions, such burden falls disproportionately on candidates who are members of “a particular race or national origin.” See Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civ. Rights Act of 1964, 2012 WL 1499883 (E.E.O.C. Guidance Apr. 25, 2012). If, as New York City Police chief Ray Kelly has just reported, 75% of violent crimes are committed by African Americans, how can African American felons safely be refused employment? See Shane Kavanaugh, *Commissioner Kelly says almost 75% of violent crime committed by African-Americans*, N.Y. DAILY NEWS (May 2, 2013), <http://www.nydailynews.com/new-york/commissioner-kelly-defends-stop-and-frisk-targeting-african-americans-article-1.1332840>. At the same time, white ex-convicts can apparently be frozen out of employment with impunity. (3) The Guidelines for National Science Foundation Grants which explain that the National Science Foundation, “values the advancement of scientific knowledge and activities that contribute to achievement of societally relevant outcomes.” Such outcomes include, but are not limited to: full participation of women, persons with disabilities, and underrepresented minorities in science, technology, engineering, and mathematics (STEM). NSF11-690, Article VI, NSF Proposal Processing and Review Procedures.

about speed but also race and culture.<sup>33</sup> If this question is asking the reader for too much, mind-bending as it undoubtedly is, consider a more politically palatable hypothetical. Suppose that, after reviewing the sports literature, Hitler had decided that African Americans were disproportionately winning track and field events and that, in the interests of encouraging Aryans to persevere in these competitions until he could refashion the country to a state of nature, Nazi Germany would no longer recognize victories by black athletes.<sup>34</sup> Would it have made a difference if Hitler had made the decision and given notice of it before the event? If Jesse Owens had won the 100 meter race by a hair's breadth and not by three meters?<sup>35</sup>

Whatever the reader's answers, *Ricci*, the subject of Part II below, helps focus attention on disputes over test validity more generally, and on what to expect when future cases on testing reach the courts. They are coming. Consider, for example, the case of elite high schools in New York City such as Stuyvesant and the Bronx High School of Science.<sup>36</sup> Admission to these prestigious schools is based on a single

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<sup>33</sup> See LARGE *supra* note 4 at 184.

<sup>34</sup> In fact, ethnic domination was the basis for much National Socialist legislation in the 1930s excluding Jews from the professions and the academy. See e.g., STEPHEN H. NORWOOD, *THE THIRD REICH IN THE IVORY TOWER* 37 (Cambridge 2009). Some American academics at the time were sympathetic to the German government's exclusionary efforts because of the Jews' "disproportionate" hold on "professional positions." *Id.* at 116. One academic claimed that since Jews made up 60% of German lawyers, but represented only 1% of the population, they wielded too much power. *Id.* at 120. Racist notions at the time likely affected the American Olympic team's participation where overrepresentation was not even an issue. Two Jewish performers were pulled out of the relay race line-up at the last minute. Speculation immediately arose that anti-Semitism was the cause in that the American Olympic establishment did not want to provoke Hitler's wrath. The story was forgotten for years and ends only in 1998 when the President of the U. S. Olympic Committee had this to say while giving a medal to famed New York Knicks announcer Marty Glickman, one of the two runners: "I was a prosecutor. I am used to looking at evidence. The evidence was there." See LARGE, *supra* note 4, at 240–43.

<sup>35</sup> See BAKER, *supra* note 9, at 94. The question of course evokes Justice Powell's landmark opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) which allowed universities to give minorities a bump, a "plus," in the interest of diversity. I know full well that, formally speaking, the "plus" factor is limited to universities. I only suggest here that perhaps it could be applied to other race-based legal problems.

<sup>36</sup> See Al Baker, *Charges of Bias in Admission Test at Eight Elite High Schools*, N.Y. TIMES, Sept. 27, 2012, at A28 (highlighting that nineteen black students were offered seats to Stuyvesant in a freshman class of 1967).

test, performance on which has led to the disproportionate exclusion of students from some minority groups.<sup>37</sup> Though Title VII has not yet been extended to educational institutions, a number of civil rights groups, including the NAACP Legal Defense and Educational Fund, have filed a complaint against New York City with the U.S. Department Education seeking to prohibit reliance on the test on the grounds that the test does not predict success and thus violates Title VII.<sup>38</sup> Without regard to the desirability of such a metric, should it have the makings of a civil rights violation?

As if to further highlight the salience of the present Article, the Second Circuit has held that a test given to New York City teachers between 1996 and 2001 for permanent certification violated Title VII because the test, which produced racial disparities, did not correlate with teacher performance.<sup>39</sup>

Consider furthermore that Americans are subjected to many tests for entrance into careers, whether as lawyers, X-ray technicians, physicians, certified public accountants, architects, locksmiths, street food vendors, hair stylists, barbers, or manicurists.<sup>40</sup> For a variety of reasons there will be race-based and other group differences in most results.

How should we think about racial differences in particular? Is New Haven's race-comes-first approach defensible? Without suggesting that the test score gaps in any particular case imply a significant knowledge gap, we shall see that in many cases the gap is quite large. What then?

Devaluing traditional testing of knowledge and cognitive skills, test critics have highlighted the importance of traits such as initiative,

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (noting that Michael Bloomberg has defended the policy on the grounds that the elite schools were designed for "the best and the brightest" and that there was no need to change admissions policies).

<sup>39</sup> *Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 236 F. Supp. 2d 314, 318–19 (S.D.N.Y. 2002).

<sup>40</sup> *See, e.g.*, American Bar Association, Bar Admissions Basic Overview, [http://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview.html](http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html) (last visited Apr. 6, 2013); American Medical Association, Medical Licensure, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician/medical-licensure.page> (last visited Apr. 9, 2013); National Association of State Boards of Accountancy, Getting a License, <http://www.nasba.org/licensure/gettingacpalicense/> (last visited Apr. 9, 2013); Texas Department of Licensing and Regulation, Barbering, <http://www.tdlr.state.tx.us/barbers/barbers.htm> (last visited Apr. 9, 2013).

collaboration and emotional intelligence for success, where less racial disparity might be expected.<sup>41</sup> These values are important. The problem is that we lack a systematic way of testing them that allows for comparability. If a job requires two skill sets, say jumping and skipping, and if only jumping can be successfully tested, does equity really require that the measurable skill be left untested?

Testing, contemporary test critics add, has unhealthy cultural roots that are broad and deep.<sup>42</sup> This is the subject of Part III. To briefly summarize: a whole postmodernist literature over the last thirty years has accused the powers that be of defining that which is important in terms of the understandings of white males.<sup>43</sup> Testing in this view measures only what white males value.<sup>44</sup> And it is not only the subject matter of tests that is found dubious and hence objectionable; it is also the method for measuring success on tests.<sup>45</sup> Because whites are good at multiple choice tests, critics argue, the paper and No. 2 pencil format has become dominant.<sup>46</sup> In sum, by testing in an Anglocentric, static, ahistorical manner, white males perpetuate their hegemony both in school and in the workplace.<sup>47</sup> Testing the test is the subject of the balance of Part III.

Part IV extends the debate over testing to another area where gaps produce a tension between test scores and racial identity, and where lawsuits are also surely forthcoming: the bar examination. This should be of special interest to law review readers. Since bar exam validity and performance also have implications for law school accreditation, that subject will be explored too. The discussion is extended further to preadmission testing, the LSAT. In effect, Part IV and V address whether the bar exam and LSAT violate Title VII standards.

Part VI responds to an issue that is unacknowledged by *Ricci* and, it seems, by the legal academy: the socioeconomic cost to the nation of creating a legally-based racial division to offset an existing social and economic division. What price equality? What is the social cost of treating harm to Frank Ricci as collateral damage? It helps to remember that Justice Powell's landmark *Bakke* opinion in effect

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<sup>41</sup> See discussion *infra* Part III.

<sup>42</sup> *Id.*

<sup>43</sup> See Delgado, *infra* note 112 and accompanying text.

<sup>44</sup> *Id.*

<sup>45</sup> See Peller, *infra* note 111, at 133-34.

<sup>46</sup> *Id.*

<sup>47</sup> See Williams, *infra* note 113 and accompanying text.

allowing the use of race to achieve diversity in our universities also limited it; race could not be *the* touchstone of an admissions decision but only a “plus” factor.<sup>48</sup> That is, there could be no racial quota. In inventing his heuristic, Powell undoubtedly understood that a quota system would have been perceived as concretizing racial favoritism, which has been greatly resented because a not insignificant number of whites are beset by disadvantages no less trying than those besetting “vulnerable populations.”<sup>49</sup> To take just one example of such a handicap, low income now explains school test gaps more than race: “The racial gaps are quite big,” reports a Stanford researcher, “but the income gaps are bigger.”<sup>50</sup>

Part VI also addresses the macroeconomics of personnel selection. What happens when jobs go to people who are not the best suited? It is surely no exaggeration to say that in economic terms other nations are eating what was once our lunch. With prevailing salaries that are a

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<sup>48</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978). For a scare story on what has happened round the world when racial preferences have been put into effect, see THOMAS SOWELL, *INTELLECTUALS AND RACE* 44-54 (2013). I am not suggesting, nor is Sowell, that the situations cited therein are identical. In none of these cases was slavery ever a factor. Sowell, who is black and a Fellow at the Hoover Institution, Stanford University, has commented on so many race issues over the last twenty-five years that he will be playing basso ostinato for us later in this Article.

<sup>49</sup> See BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (Metropolitan 2001) (providing a study of living conditions of vulnerable populations); RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH, HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* 284 (2012) (stating that, controlling for academic preparation, blacks of modest means are 30% *more* likely to go to colleges than similarly situated whites). At the same time, within the low-income category, African Americans make up 6 percent and whites 69 percent of “high achieving” high school grads. Since there are 5 times as many whites as African Americans but more than 10 times as many high-achieving white students, and since whites are less likely to be low income in the first place than African Americans, poor whites would seem to suffer disproportionately from race-based admissions. See David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. TIMES A1 (Mar. 17, 2013), [http://www.nytimes.com/2013/03/17/education/scholarly-poor-often-overlook-better-colleges.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/17/education/scholarly-poor-often-overlook-better-colleges.html?pagewanted=all&_r=0). There is more to the story. Law schools give out four times as much financial aid, on a per capita basis, to high-income blacks as to low income whites. See SANDER, *supra*, at 9 (2012). This discussion surely explains objections to income-based affirmative action by (racial) diversity scholars.

<sup>50</sup> See Jason DeParle, *For Poor, Leap to College Often Ends in a Hard Fall*, N.Y. TIMES, Dec. 23, 2012, at A1, A30 (quoting Professor Reardon).

fraction of ours, other nations produce many more engineers, file an increasing number of patents, and even train large numbers of English-speakers.<sup>51</sup> Nothing but outstanding performance on our part can help us to preserve, much less improve, our standard of living.<sup>52</sup> This standard is no less applicable to legal services, where work is being exported, than to anything else. What is the cost in this setting of not making preparedness the organizing principle of workplace hiring?

The few inquiries into efficiency aspects of affirmative action have proved inconclusive.<sup>53</sup> There should be many more, but it is not easy to speak on deeply felt racial matters.<sup>54</sup> A provocative new report by

<sup>51</sup> See Bolaji Ojo, *East-West Engineering Salary Gulf: Join the Conversation*, EE TIMES (Nov. 20, 2009), <http://www.eetimes.com/electronics-news/4086148/East-West-engineering-salary-gulf-Join-the-conversation>; Mike Shammass, *Number of US engineers in Decline Relative to China, India*, THE CHRONICLE (Sept. 20, 2011), [www.dukechronicle.com/articles/2011/09/20/number-us-engineers-decline-relative-china-india](http://www.dukechronicle.com/articles/2011/09/20/number-us-engineers-decline-relative-china-india); *China Fifth in UN Patent Filings, India Way Behind*, REDIFF (Feb. 9, 2010), <http://business.rediff.com/report/2010/feb/09/china-fifth-in-un-patent-filings-india-way-behind.htm>; *Indiaspeak: English is Our 2nd Language*, TIMES OF INDIA (Mar. 14, 2010), [http://articles.timesofindia.indiatimes.com/2010-03-14/india/28117934\\_1\\_second-language-speakers-urdu](http://articles.timesofindia.indiatimes.com/2010-03-14/india/28117934_1_second-language-speakers-urdu).

<sup>52</sup> See Tom Friedman, *Average is Over*, N.Y. TIMES, Jan. 24, 2012, at A29, available at <http://www.nytimes.com/2012/01/25/opinion/friedman-average-is-over.html>; Tom Friedman, *Average is Over, Part II*, N.Y. TIMES, Aug. 8, 2012, at A19, available at <http://www.nytimes.com/2012/08/08/opinion/friedman-average-is-over-part-ii-.html>.

<sup>53</sup> See *infra* notes 301–304 and accompanying text.

<sup>54</sup> “[N]o Euro-American person, except for one insensitive to the charge of racism,” writes black Harvard sociologist Orlando Patterson, “dares say what he or she really means.” ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION* 2 (1997). See Eric Holder, Remarks at the Department of Justice, (Feb. 18, 2012), <http://www.justice.gov/ag/speeches/2009/ag-speech-090218.html> (calling Americans “cowards” for not speaking their minds about race). A number of black academics have similarly pleaded for frank and intense inter-racial discourse. See, e.g., HARLON DALTON, *RACIAL HEALING* 97, 4 (Doubleday 1995).

If engagement is the first step in healing, the second is pure unadulterated struggle . . . We will never achieve racial healing if we do not confront one another, take risks . . . say all the things that we are not supposed to say in mixed company.

*Id.* Does this mean that power deficits in vulnerable populations should be ignored in interracial discourse? “Afro-American and Euro-American people should treat each other exactly alike, as responsible moral agents. We do not

the Organisation of Economic Co-Operation and Development (OECD) may prove helpful.<sup>55</sup> With presumably no stake in the issue of testing, or of American white male values, OECD found that a key to understanding economic growth rates in countries around the world is cognitive skill levels, *as measured by multiple choice science and math tests*.<sup>56</sup> OECD found further that if on these tests—and on reading tests whose results highly correlate therewith—America suddenly experienced educational outcomes equal to those produced by the best educational systems in the world, the present value of the increase in Gross National Product would be in the many trillions of dollars.<sup>57</sup> The OECD report is not a brief against affirmative action; nor is this Article. To the extent that affirmative action puts more accomplished people in positions of greater responsibility, it will increase efficiency. To the extent that affirmative action serves to inspire members of vulnerable populations to develop skills, it will do the same.<sup>58</sup> What the OECD study does suggest is that a society that belittles knowledge and learning can pay a high economic price.

A conclusion ties the threads of this essay together. So in their own way do two distinguished white scholars of testing: “[I]f racial equality is America’s goal,” they wrote fifteen years ago regarding the SAT, “then reducing the black-white test score gap would probably do more to promote this goal than any other strategy that commands broad-

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need any special sets of sensitivities in our interactions.” PATTERSON, *supra*, at 150. I accept Holder’s, Dalton’s, and Patterson’s calls and rules for discourse.

<sup>55</sup> The OECD is a consortium of 34 democratic and mostly developed countries. See OECD, *Members and Partners*, <http://www.oecd.org/about/membersandpartners/> (last visited Apr. 19, 2013).

<sup>56</sup> OECD, *THE HIGH COST OF LOW EDUCATIONAL PERFORMANCE: THE LONG-RUN ECONOMIC IMPACT OF IMPROVING PISA OUTCOMES* 14 (2010), <http://www.oecd.org/pisa/pisaproducts/pisa2006/44417824.pdf>. The PISA test is part multiple choice, part open ended question exam. See *Program for International Student Assessment (PISA): Frequently Asked Questions*, NAT’L CTR. FOR EDUC. STAT., <http://nces.ed.gov/surveys/pisa/faq.asp> (last visited Apr. 20, 2013).

<sup>57</sup> See OECD, *supra* note 56, at 25–26 (stating that by raising the average score of PISA test to 546 or 400 would have an increase of nearly \$103 trillion or \$73 trillion, respectively, in GDP in the United States).

<sup>58</sup> Affirmative action might increase productivity through its role-modeling function: encouraging minorities to develop their skills because they see that opportunities are available. “You can’t be what you can’t see.” MISS REPRESENTATION (Girls’ Club Entertainment 2011) (quoting Marian Wright Edelman).

based political support. Reducing the test score gap” they hold, is “probably both necessary and sufficient for substantially reducing educational inequality and earnings [and probably differences] in crime, health and family structure.”<sup>59</sup> The authors, to be sure, are not necessarily saying that the tests are valid; what they are suggesting is that undermining tests will not help achieve the foregoing goals.

## II. TESTING RICCI

If *Ricci* is to provide a firm foundation for this essay—if the case is to offer a useful preview of future legal, political, and moral challenges to testing—a full evaluation of it would appear to be required. Because, however, (a) a number of readers will be familiar with *Ricci*; (b) the opinion itself is factually rich and almost fifty pages long; and (c) in the four years since it was decided, *Ricci* has engendered an extensive literature, I limit my discussion to the essentials.

I limit discussion of the case for other reasons as well. First, the direct impact of *Ricci* can often be avoided by an employer who sets out to do so—in advance. Believing that a test will yield too few successful minority members, an employer can tailor the questions to minimize disparities and administer test preparation programs for employees. To the extent that, say, minorities might be expected to perform less well on a multiple choice test, the employer could simplify questions or set a low threshold score for qualification and make final selections through, say, a lottery. The employer can, in addition, sometimes create an affirmative action program. Second, I do not suggest that non-passers should be foreclosed from attacking tests. My principal objection to what New Haven did in *Ricci* is the peculiar circumstance that it invalidated its own test for reasons of race. Finally, as suggested above, I want to get at the larger meaning and applications of testing.

For the purpose of choosing among contenders for fire lieutenant and captain positions, a New Haven agreement with the firefighter’s union required that candidates take a two-part exam.<sup>60</sup> The first part, making up sixty percent of the total score, consisted of a series of multiple choice questions on fire science; the second, representing

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<sup>59</sup> CHRISTOPHER JENCKS & MEREDITH PHILLIPS, *THE BLACK-WHITE TEST SCORE GAP* 3–4 (1998).

<sup>60</sup> See *Ricci v. DeStefano*, 557 U.S. 557, 564 (2009).



forty percent, consisted of oral interviews with candidates.<sup>61</sup> Under its Charter, the City could promote any one of the top three performers.<sup>62</sup> No notice was apparently given to firefighters that the test would be invalidated if African Americans failed to qualify for the promotion.

African Americans made up thirty percent of firefighters in New Haven and nine percent of those ranked captain and above.<sup>63</sup> Fourteen black firefighters took the exams for promotion, but so many other firefighters scored higher that none of the African Americans were eligible for promotion to either a lieutenant or captain position.<sup>64</sup> After much discussion about the Title VII implications,<sup>65</sup> the New Haven Civil Service Board refused to validate the exam and no one was promoted.<sup>66</sup>

In an effort to force New Haven to honor the test results, some white and Hispanic firefighters sued the City to force it to accept those results.<sup>67</sup> The federal district court held for New Haven<sup>68</sup> and the Second Circuit affirmed<sup>69</sup> and then denied a rehearing in a one-paragraph 7-6 *per curiam* decision.<sup>70</sup> On appeal, in a 5 to 4 decision written by Justice Kennedy that has been criticized by a number of

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 610 (Ginsberg, J., dissenting).

<sup>64</sup> *Id.* at 566. There were seven lieutenant positions and five captain positions open. The way the process worked under the Charter provision described above was that a promotion appointment would be made from the top three scorers. This would open up a slot so the next highest scorer would rise to the top three. As a practical matter, then, one had to score in the top 10 to have a chance at a promotion to the seven lieutenant slots.

<sup>65</sup> *Id.* at 567–568.

<sup>66</sup> *Id.* at 574.

<sup>67</sup> *Id.* at 562–563.

<sup>68</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006) (“[D]efendants’ motion for summary judgment . . . will be granted as to plaintiffs’ [Title VII] claims [and] plaintiffs’ cross-motion for summary judgment . . . will be denied . . .”).

<sup>69</sup> *Ricci v. DeStefano*, 264 Fed. Appx. 106, 107 (2d Cir. 2008) (“We affirm, substantially for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below.”).

<sup>70</sup> *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (“We affirm, for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below.”).

academics,<sup>71</sup> the Court, as previously suggested, held that Title VII required that plaintiffs be promoted.<sup>72</sup>

To understand *Ricci*, we must evoke *Griggs v. Duke Power*.<sup>73</sup> In that case, the Court first established that a violation of Title VII did not require intent to discriminate; a violation could exist where testing had a “disparate impact” on protected classes.<sup>74</sup> Plaintiffs in *Griggs* had challenged a requirement of Duke Power Co. that employees have a high school diploma and pass a test of general aptitude in order to qualify for higher-paid positions.<sup>75</sup> Duke Power answered that screening out black employees was not its intent, which was to have the best employees in place.<sup>76</sup>

Though agreeing with Duke Power that there was no intent to discriminate, a dubious conclusion,<sup>77</sup> the Supreme Court held unanimously that under Section 703 of the Civil Rights Act of 1964 Duke Power could not impose these educational and cognitive criteria

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<sup>71</sup> See, e.g., Brodin, *supra* note 1; Ann. C. McGinley, *Ricci v. DeStefano: A Masculinities Theory*, 31 HARV. J. OF L. & GENDER 581, 616–19 (2010) (explaining that the Supreme Court decision in *Ricci* and then testimony from *Ricci*’s plaintiffs at the Supreme Court nomination hearings of Sonya Sotomayor—one of the deciding judges in the Second Circuit Court of Appeals decision overturned by *Ricci*—represented the affirmation and promotion of white male masculinity in American culture). See also JOHN A. POWELL, RACING TO JUSTICE 105 (2012).

<sup>72</sup> If the battle was intense within the Court, it was no less so outside. The Daily News followed up with an editorial lauding the decision, while a New York Times editorial lamented it. See Editorial, *Equal Justice: Supreme Court Ruling on New Haven Firefighters Makes Employment Law Fairer*, N.Y. DAILY NEWS (June 30, 2009), <http://www.nydailynews.com/opinion/equal-justice-supreme-court-ruling-new-haven-firefighters-employment-law-fairer-article-1.430147>; Editorial, *Firefighters and Race*, N.Y. TIMES, July 1, 2009, at A32, available at <http://www.nytimes.com/2009/07/01/opinion/01wed1.html>

<sup>73</sup> *Griggs v. Duke Power Co.*, 401 US 424 (1971).

<sup>74</sup> *Id.* at 430 (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

<sup>75</sup> *Id.* at 426.

<sup>76</sup> *Id.* at 431.

<sup>77</sup> The Court pointed to the fact that the company had a policy of paying two-thirds of the cost of a high school equivalency degree. *Id.* at 432. On the other hand, Duke Power had been discriminating for years and made its rule effective only on the very day that the Civil Rights Act of 1964 took effect. See RICHARD THOMPSON FORD, THE RACE CARD : HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 214 (2008).

because the record showed that employees had performed successfully on the jobs in question without having satisfied the requirements.<sup>78</sup> To repeat, the intent to discriminate was not required for a finding of a Civil Rights Act violation; disparate impact was sufficient.<sup>79</sup> The *Griggs* principle was codified in the Civil Rights Act of 1991,<sup>80</sup> the meaning of which was explored in *Ricci*.<sup>81</sup>

The rub in *Ricci*, as the Court majority recognized, is that New Haven had violated disparate *treatment* in the clearest manner: it voided the test “because of race,”<sup>82</sup> because no African Americans came out on top. Surely that conclusion is right. No evidence showed that, absent the racial disparity, New Haven would have thrown out the test. Facing the Court for the first time in *Ricci*, then, was what to do in a disparate impact case where the remedy *required* disparate treatment.<sup>83</sup>

Disparate treatment could not simply be ignored. As Justice Kennedy wrote for the Court, disparate treatment is the “original, foundational prohibition.”<sup>84</sup> A disparate treatment charge, the Court further held,<sup>85</sup> could not be overcome merely by *fear* of a disparate

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<sup>78</sup> See *Griggs*, 401 U.S. at 431-32.

<sup>79</sup> *Id.*

<sup>80</sup> See 42 U.S.C.A. § 2000e-2(k)(1)(A)(i)

[A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

*Id.*

<sup>81</sup> *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

<sup>82</sup> *Id.* at 580.

<sup>83</sup> In statutory terms, plaintiffs contended that not certifying the test results was a violation of disparate treatment rules under 42 U.S.C. § 2000e-2(a), which prohibit a deliberate act by an employer to disadvantage one race. *Ricci*, 557 U.S. at 575. Defendants argued that certifying the results would have resulted in a disparate impact violation under 42 U.S.C. § 2000e-2(k), which prohibit a deliberate act by an employer to disadvantage one race. *Ricci*, 557 U.S. at 575.

<sup>84</sup> *Ricci*, 557 U.S. at 581. That line of reasoning is meaningful, and not only because of the way in which anti-discrimination case law developed. Intentional malfeasance is normally punished more harshly than the unintentional kind because the moral violation is greater. We need only compare for this purpose the sanctions for crimes based on intent and those based on willful negligence.

<sup>85</sup> *Id.*

impact claim; that would render disparate treatment meaningless and lead to “de facto quota system[s].”<sup>86</sup> Accordingly, it held, there had to be a “strong basis of evidence,” *i.e.* a compelling case, for disparate impact to justify disparate treatment.<sup>87</sup> Nothing short of that would justify the disparate treatment violation.

The Court continued with the question of whether New Haven had such a compelling case. Title VII explicitly addresses the first part of the required analysis; it requires proof of a “significant statistical disparity” of impact.<sup>88</sup> In such an eventuality, said the majority, the employer can defend by showing that the “challenged practice is job-related for the position in question and consistent with business necessity.”<sup>89</sup> The burden would seem to be on test challengers.

Here is where test *validity* comes in, though Title VII does not use that term.<sup>90</sup> Even if the employer satisfies the business necessity burden, employees can still win their case if they can identify “an equally valid, less discriminatory alternative that served the city’s needs but that the City refused to adopt.”<sup>91</sup>

How did Mr. Ricci fare under these tests? The Court conceded the existence of a disparate impact.<sup>92</sup> But it held that the tested skills were consistent with “business necessity,” evidenced by the extensive efforts made to construct a valid test.<sup>93</sup> Test developers had ridden along with black as well as other firefighters to ensure that multiple

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 583 (“[T]he standard appropriately constrains employers’ discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability . . .”).

<sup>88</sup> *Id.* at 586. A statistical burden is often satisfied by use of standards reflected in Equal Opportunity Employment Commission Guidelines, which hold that if the percentage of protected class members is less than 80% of the proportion of the racial group with the highest representation, a disparate impact will be presumed. *Id.* (citing 29 CFR § 1607.4(D) and *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 995, n3 (1988)).

<sup>89</sup> *Ricci*, 557 U.S. at 613 (Ginsburg, J., dissenting) (quoting 42 U.S.C. § 2000e–2(k)(1)(A)(i)).

<sup>90</sup> A test is defined as valid if it properly measures that which is relevant to its stated purpose. *See* EDWARD G. CARMINES & RICHARD A. ZELLER, *RELIABILITY AND VALIDITY ASSESSMENT* 17 (1979).

<sup>91</sup> *See Ricci*, 557 U.S. at 629.

<sup>92</sup> *Id.* at 585–586.

<sup>93</sup> *Id.* at 587.

choice questions took into account all firefighting styles.<sup>94</sup> Test developers had also trained panelists, two-thirds of whom were minorities, for the oral part of the test.<sup>95</sup>

For the dissent, the test was not consistent with “business necessity” because New Haven could have done more to ensure that the results produced racially proportionate results without sacrificing validity. Specifically, the City of New Haven could have used a sixty percent oral, forty percent written balance as other communities had done to recruit minorities, or tested candidates under simulated firefighting conditions.<sup>96</sup> For the majority, New Haven had not shown that these alternate arrangements were equally valid, only that they might have yielded some successful minority candidates.<sup>97</sup> The dissent countered that the burden was on the employer to show that business necessity, but even if it had, increasing the weight of the oral part of the test was the “‘alternative employment practice’ which the employer ‘refuse[d] to adopt.’”<sup>98</sup>

Missing from the various opinions is any discussion of how to assess the validity of a test. Indeed, validity has proved a major stumbling block in the development of discrimination jurisprudence. This makes it especially difficult for the party bearing the evidentiary burden.

What the Court shied away from was acknowledgment that a multiple choice component was not only cost effective but also secure and reliable.<sup>99</sup> Too much reliance on oral interviews was risky. Questions could have been passed from one candidate to another. But even absent the security issue, if interviewers had used different questions, issues of comparability would have been raised. Different

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<sup>94</sup> *Id.* at 565 (“At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates.”). One wonders whether different racial groups have different firefighting styles.

<sup>95</sup> *Id.* at 565–566.

<sup>96</sup> The dissent also opined that New Haven could have “banded” scores to undercut the significance of the numerical score achieved by the candidates. As to banding scores, the Court held it was forbidden under Title VII Section 2000e-2(l). *Id.* at 590.

<sup>97</sup> *Id.* at 589.

<sup>98</sup> *Id.* at 624.

<sup>99</sup> An exam is reliable when test-takers’ scores would not change on another exam of equal complexity.

interviewers in oral interviews would surely value answers differently. And although the opinion makes no reference to possible bias in interview-based grading,<sup>100</sup> in a legal system where race-based employment discrimination cases can bring enormous adverse publicity, to say nothing of liability, this concern cannot be ignored.

To sum up *Ricci*, might I invoke roulette? For the majority, potential employees come to the employment table with bets on red or black. If after the croupier spins the wheel, the marble comes to rest on the bettor's color, the bettor wins. If not, he or she loses. For the dissent, by contrast, if, say, the marble stops on black, black wins, but if red comes up and if black has not won a fair share of spins, the wheel gets spun again. One color, in sum, is strongly favored. A two-year-old ad by the University of Arkansas Department of Music bespeaks a similar preference in employment: "The department is especially interested in candidates who can contribute to the diversity and excellence of the academic community."<sup>101</sup> Outreach is commendable, but the order of objectives joltingly declares "diversity above all."

### III. TESTING

We are not done with *Ricci*. But for now, a pause to ask: Where does the attack on testing of learning and knowledge come from? After all, if learning and knowledge is to be prized in some particular endeavor, does it not have to be effectively demonstrated? Indeed, the SAT was allegedly introduced precisely to provide some comparability and objectivity, with the larger goal of "deposing the existing undemocratic elite and replace it with a new one made up of brainy, elaborately trained, public-spirited people drawn from every section and every background."<sup>102</sup> It is hard to imagine that SAT critics would prefer that colleges go back to pre-SAT days when admissions procedures favored Andover and Phillips Academy graduates.

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<sup>100</sup> See *infra* notes 127–132 and accompanying text.

<sup>101</sup> E-mail sent out by American Musicological Society to members Mar. 16, 2011. I thank my wife for bringing this to my attention. The reader who might be inclined to dismiss the ad as an anomaly should Google the quoted language to see how common the phrasing is.

<sup>102</sup> NICHOLAS LEMANN, *THE BIG TEST, THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 5 (1999). Lemann, I should point out, is nevertheless highly critical of the weight given to testing.

To set the stage for the discussion of the critique of testing, a brief philosophical sidebar follows on valuing of what it is that is being tested: knowledge. The university, like other institutions, can be expected to test the very product it produces. *Crescat Scientia et Vita Excolatur* is the University of Chicago's motto.<sup>103</sup> And yet, perhaps because academia seems to have more than its share of idiots savants (in the literal sense), leading thinkers have long suspected that knowledge is not enough.<sup>104</sup> Indeed, knowledge has been recognized for some time not only as an alternative to but also as a serious distraction from a higher-order value, wisdom.<sup>105</sup> But this idea has presented a problem: if wisdom is not acquired through knowledge, how is it acquired? According to another hallowed tradition, through suffering.<sup>106</sup> One can see why these lines of thinking might be attractive to some scholars who deal with issues of race. Vulnerable populations do not need knowledge in the same way as others do; oppression itself makes them wise.

The foregoing notions, having been around for a long time of course, could only begin to explain the contemporary challenge to knowledge and testing. To sustain a more up-to-date critique of knowledge, critics looked for ways to tie knowledge to history, culture and race. The connection they made came through postmodernism, an academic movement some fifty years old arising out of the experience

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<sup>103</sup> Translation: Let knowledge grow from more to more, and so be human life enriched. See Univ. of Chicago, About, <http://www.uchicago.edu/about/> (last visited, Apr. 28, 2013).

<sup>104</sup> "Science is organized knowledge. Wisdom is organized life." WILL DURANT, *THE STORY OF PHILOSOPHY* 271 (1991) (summarizing IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Paul Guyer & Allen W. Wood eds., Cambridge University Press 1999) (1787)). "Science gives man knowledge which is power; religion gives man wisdom which is control." MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 15 (First Fortress Press 1981) (1963).

<sup>105</sup> "Where is the Life we have lost in living?/Where is the wisdom we have lost in knowledge?/Where is the knowledge we have lost in information?" T. S. Eliot, *Choruses of the Rock I* (Faber 1973). The best illustration of the distinction: "knowledge consists of knowing that a tomato is a fruit, and wisdom consists of not putting it in a fruit salad." Miles Kington, *Heading For a Sticky End*, *THE INDEPENDENT* (Eng.), March 28, 2003.

<sup>106</sup> "For it was Zeus who set men on the path to wisdom when he decreed the fixed law that suffering alone shall be their teacher. Even in sleep pain drips down through the heart as fear all night, as memory. We learn unwillingly." AECHYLUS, *Agamemnon*, in 1 *THE COMPLETE AESCHYLUS: THE ORESTEIA* 51 (Peter Burian & Alan Shapiro 2003, 2011). A longstanding tradition of religious self-mortification, of course, supports this view.

of World War II and the Cold War. Concerned with the propaganda efforts of the great powers to spread their ideologies through the many manipulative tools available in an increasingly media-centered world, postmodern scholars emphasized the need to know not only what was being said, but no less important, who was saying it, who controlled the medium of discourse, to whom the message was directed, and why.<sup>107</sup> Postmodernists, in short, highlighted the importance of identity, power, and a distrust of claims of universal truth.

No legal scholar has made the case better than Georgetown Law's Gary Peller. Integration, he writes, is responsible for black "cultural genocide" in that it requires that blacks permit whites to decide what is "knowledge and myth, reason and emotion, and objectivity and subjectivity . . . . Understanding what society deems worthy of calling 'knowledge' depends on a prior inquiry into a social situation . . . . Culture precedes epistemology."<sup>108</sup>

Out of the postmodernist movement, which produced a substantial and increasingly influential literature, a smaller one has developed over the last twenty years that has challenged the validity of tests for both admission to colleges/universities and job selection. This movement seems to have grown only stronger as anti-black animus has decreased. Why? Perhaps because it has become clear that a

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<sup>107</sup> For a masterful account of the corruption of language in Nazi Germany, see VICTOR KLEMPERER, *THE LANGUAGE OF THE THIRD REICH* (Bloomsbury 2006). See also DAVID BRANDENBERGER, *PROPAGANDA STATE IN CRISIS: SOVIET IDEOLOGY, INDOCTRINATION, AND TERROR UNDER STALIN, 1927–1941* (Yale 2012).

<sup>108</sup> Gary Peller, *Toward a Critical Cultural Pluralism: Progressive Alternatives to Mainstream Civil Rights Ideology*, in CRENSHAW ET AL., *CRITICAL RACE THEORY* 142–43 (New Press 1995). This formulation is, of course, based on Foucauldian notions of discourse. See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., New York: Pantheon 1972). If a little knowledge is a dangerous thing in a culture-bound world, then a great deal of knowledge can be even more so. For a recent warning about the poisoned fruit of the tree of knowledge, see JONAH LEHRER, *IMAGINE: HOW CREATIVITY WORKS* (2012). Lehrer concludes that it can be better not to know, that "knowledge can be a subtle curse." *Id.* at 135. The point Lehrer is making is that creativity can arise from being free of the system, the knowledge domain, a point embodied in the notion that "a little child shall lead them" (Isaiah 11:6). No argument there. But is this prophecy a general brief for ignorance?



continuing and wide white-black test gap was not narrowing.<sup>109</sup> For reasons of space I cite only a small part of this literature.<sup>110</sup>

What does knowledge have to do with merit? From a basis of white (my term) knowledge, says Gary Peller, the idea flows naturally that “merit itself is neutral, impersonal and somehow developed outside the economy of social power—with its significant currency of race, class, gender—that marks American social life.”<sup>111</sup> The implication for tests should be obvious. “Merit,” adds Richard Delgado, is “that which I, the preexisting and presituated self, use to judge you, the Other. The criteria I use sound suspiciously like me and the place where I stand.”<sup>112</sup> The test whether by conscious design or otherwise, just serves to support the social *status quo*.<sup>113</sup>

We do not learn anything useful from academic and job tests, according to distinguished scholars Susan Sturm and Lani Guinier,

<sup>109</sup> See SANDER, *supra* note 49, at 259–60 (2012).

<sup>110</sup> For a good background of the case against testing, see Daria Roithmayr, *Deconstructing the Distinction between Bias and Merit*, 10 LA RAZA L. J. 363 (2000). I do not mean to imply that the attack on merit has gone unanswered. For a strong defense of merit, if not tests themselves, see DANIEL A. FARBER AND SUZANNA SHERRY, *BEYOND ALL REASON, THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 27–33, 52–71 (1997).

<sup>111</sup> See Peller, *supra* note 108, at 132.

<sup>112</sup> Richard Delgado, *Brewer’s Plea: Critical Thoughts on Common Cause*, 44 VANDERBILT L. REV. 1, 9 (1991).

<sup>113</sup> Views such as this have become truisms of postmodernist epistemology. For one version of how such a situation might actually come about, consider the following image:

The mind funnels of Harvard and Yale are called standards. Standards are concrete monuments to socially accepted subjective preference. Standards are like paths picked through fields of equanimity, worn into hard wide roads over time, used always because of collective habit, expectation and convenience. The pleasures and perils of picking one’s own path through the field are soon forgotten; the logic or illogic of the course of the road is soon rationalized by the mere fact of the road.

PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 99 (Harvard 1991). However rhetorically effective such a notion is, with its roots in Foucault and Thomas Kuhn among others, we should not be unthinkingly swayed one way or the other by Williams’ imagery. Would Williams say the same thing about a test of Euclidian geometry given by Euclid himself? To be sure, as we shall see, some testing is indeed the product of not just uncritical but nefarious thinking. See *infra* note 200, and accompanying text. See also THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (University of Chicago 1970).

who spell out their reasons. Being “deeply problematic as a predictor of actual job performance,” and thus “underinclusive of those who can actually do the job,” standardized testing does violence to the fundamental principles of equity and ‘functional merit’ in its distribution of opportunities for admission to higher education, entry-level hiring, and job promotion.<sup>114</sup> Its overall impact is a “class-linked opportunity structure that credentializes a ‘social oligarchy’.”<sup>115</sup> Sturm and Guinier would revolutionize so called merit-based admissions and hiring practices by replacing much in them—even hard-won affirmative action—with a lottery system.<sup>116</sup>

The foregoing discussion raises a question: where employees come in ignorant, how will they know what to do on the job? No problem; the employer will teach them. Today’s workplace is characterized by faster and faster change, Sturm and Guinier say, so no one is prepared for the job anyway; and continuous on-the-job training is needed to ensure workplace productivity.<sup>117</sup> From this questionable analysis, one can extrapolate the management theory of test critics embodied in the opening epigraph: “[J]ob knowledge is only a small part of the job performance domain;” success derives from leadership, character, and integrity.<sup>118</sup> These qualities, one might conclude, can substitute for knowledge.

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<sup>114</sup> Susan Sturm & Lani Guinier, *The Future of Affirmative Action; Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996). I do not suggest here that Sturm and Guinier are representative of the legal academic profession but only that, among the first to attack testing, they can be fairly said to have inspired the movement examined here.

<sup>115</sup> *Id.* (citing Michael Lind, *Prescriptions for a New National Democracy*, 110 POL. SCI. Q. 563, 582 (1995–96)).

<sup>116</sup> *Id.* at 1012. There has of course been some pushback on testing issues, including from the black community. Among those providing it is jazz critic and epistemologist Stanley Crouch. “Now separatist self-esteem is said to be the high road,” he writes derisively. “We aren’t supposed to have any standards because standards were all developed as forms of exclusion and oppression.” STANLEY CROUCH, *THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE*, xi (1995).

<sup>117</sup> See Sturm & Guinier, *supra* note 114, at 958. See also Jayme S. Ganey, *Navigating the Job Hunt*, ESSENCE, May 2013, at 100 (“budgets for training employees went out the window about 20 years ago” and “[h]iring managers don’t want to hear that you’re a quick learner”) (citing DARNELL CLARKE, *EMPLOYMENTOLOGY: A PRACTICAL SYSTEMATIC METHODOLOGY OF FINDING EMPLOYMENT BY A HIRING MANAGER* (2012)).

<sup>118</sup> Sturm & Guinier, *supra* note 114, at epigraph and note.

But can we tolerate supervisors who are less informed fire scientists than the firefighters they supervise? Sturm and Guinier's revolutionary view of the industrial world lends itself to a simple hypothetical test. Imagine a company with a firefighter whose claim to fame is that he was quarterback and captain of his high school football team. He is a born leader. If Dr. Lawrence Peter is right, he gets promoted.<sup>119</sup> When a report comes into the station of a towering inferno, however, it is hard to imagine that the firefighting team will follow its new leader into it if members doubt his knowledge of fire science.

Could any tests be useful in matching job applicants to jobs? Sturm and Guinier's answer would, at first, seem to be yes: "functional merit [*i.e.*, ability to perform] is a legitimate consideration in distributing jobs and educational opportunities."<sup>120</sup> And yet their final answer is no. "We are not suggesting that the solution is to develop a new, less biased, equally universal test that more accurately predicts future performance."<sup>121</sup> Rather, they are "challenging the idea of prediction."<sup>122</sup> Tests, do not measure "discipline, emotional intelligence, commitment, drive to succeed, and reliability"<sup>123</sup>—by all accounts, we can agree, central elements for success in all endeavors. Instead, the authors assert, tests reward qualities such as "willingness to guess, conformity, and docility."<sup>124</sup> Tests, Sturm and Guinier add, also ignore other important traits such as "empathy, cooperation, persuasion, and the opportunity to build consensus among people."<sup>125</sup> We will hear these arguments again in the context of the bar exam.<sup>126</sup>

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<sup>119</sup> See LAURENCE J. PETER & RAYMOND HULL, *THE PETER PRINCIPLE: WHY THINGS ALWAYS GO WRONG* (HarperCollins 2011) (1969) (criticizing American business for too often promoting people to their level of incompetence). Sarah Palin may be a useful, if less than perfect, illustration. For the hard-to-believe story of how the McCain team tried to prep an entirely unprepared Sarah Palin for the 2008 campaign, see generally JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* (2010).

<sup>120</sup> See Sturm & Gunier, *supra* note 114, at 968–69.

<sup>121</sup> *Id.* at 1003.

<sup>122</sup> *Id.*

<sup>123</sup> See *id.*

<sup>124</sup> *Id.* at 977.

<sup>125</sup> See *id.* at 976 n.94.

<sup>126</sup> See generally Part IV.

In short, since nothing qualifies as (universal) knowledge and since there are so many imponderables in selecting good personnel, testing is useless.

Easy to say, but is prediction really impossible? Is non-technical employment testing produced at great cost and widely used indeed meaningless?<sup>127</sup> Do those in our own area of endeavor, the LSAT and current bar exams—under increasing attack and the subject of the next section—say nothing useful about the competence of test-takers in law school and as future lawyers?

As to the first question, University of Pennsylvania law professor Amy Wax has supplied some good, if deeply unsettling, answers in a new law review article challenging important aspects of disparate impact jurisprudence.<sup>128</sup> She lays the groundwork by reminding us that we have a labor policy consistent with a “competitive meritocracy”<sup>129</sup> and that *Griggs* does not require racial balance in the workplace as long as employment standards are work-related.<sup>130</sup> Yet, she says, the specter of litigation has pushed employers to hire those whom they undoubtedly would consider unprepared.<sup>131</sup>

Reviewing the industrial organization and psychology (IOP) literature, Wax’s findings are stark: “research in [IOP] has repeatedly documented that, despite their imperfections, tests and criteria such as those at issue in *Griggs* (which are heavily ‘g’-loaded and thus dependent on cognitive ability [aptitude tests]) remain the best predictors of performance for jobs at all levels of complexity.”<sup>132</sup> A

<sup>127</sup> Among well-known tests are the Minnesota Multi-Phasic Personality Inventory and Myers-Briggs Type Indicator. See generally ANA M. GAMEZ, THE USE OF THE MINNESOTA MULTIPHASIC PERSONALITY INVENTORY-II (MMPI-2) IN PRE-EMPLOYMENT EVALUATIONS (2011); ISABEL BRIGGS MYERS & MARY H. MCCAULLEY, MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR (1985).

<sup>128</sup> See Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621 (2011). Wax has written extensively on race issues. See, e.g., RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY (2009); *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008).

<sup>129</sup> See Wax, *supra* note 128, at 623 (citing Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 GA. L. REV. 993, 1037–39 (2009)).

<sup>130</sup> See Wax, *supra* note 128, at 627 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>131</sup> See Wax, *supra* note 128, at 694–95.

<sup>132</sup> *Id.* at 623. Psychologists have defined “g” as the ability to learn. See Linda S. Gottfredson, *Why g Matters: The Complexity of Everyday Life*, 24

strong statement demands support, which Wax provides.<sup>133</sup> The importance of cognitive ability, concludes Wax, is now “widely accepted among IOP experts, and, indeed, is a basic, shared premise of the [IOP] field.”<sup>134</sup> Did a unanimous Court in *Griggs*—again, the progenitor of disparate impact jurisprudence—get the case wrong?

Yes, suggests Wax,<sup>135</sup> for despite all the cynicism about tests of cognition, these tests predict, on average, a little over fifty percent of job performance,<sup>136</sup> and for all types of positions.<sup>137</sup> Wax’s estimate may be on the high side. Without rejecting ‘g’ as an important predictor, other researchers have put the datum at twenty-five percent.<sup>138</sup> Aware of the critiques of cognitive tests, Wax adds that

INTELLIGENCE 1, 83, 91–92 (1997). Football players may need cognitive ability, too. Prospective players these days are asked to take the Wonderlic Cognitive Ability Test at the NFL Combine each year. See Brian D. Lyons et al., *Not Much More Than g? An Examination of The Impact of Intelligence on NFL Performance*, 22 HUMAN PERFORMANCE 225, 226 (2009). Is requiring this test racist?

<sup>133</sup> “Cognitive ability is the strongest single predictor of job performance.” Wax, *supra* note 128, at 623, 642 (quoting Patrick F. McKay, *Perspectives on Adverse Impact in Work Performance: What We Know and What We can Learn About in ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION* 249, 253 (James L. Outtz, ed., CRC Press 2010)). “[I]ntelligence tests are the single best predictor of job performance and thus should be afforded special status in the area of personnel selection” Wax, *supra* note 128, at 641 n.97 (quoting Harold W. Goldstein, Charles A. Scherbaum, & Kenneth P. Yusko, *Revisiting g: Intelligence Adverse Impact, and Personnel Selection* in ADVERSE IMPACT, *supra* this note, at 96, 100); “for entry-level jobs there is no better predictor [than cognitive ability], which has a mean validity of .53.” Wax, *supra* note 128, at 642 n.97 (quoting John E. Hunter & Ronda F. Hunter, *Validity and Utility of Alternative Predictors of Job Performance*, 96 PSYCHOL. BULL. 72, 72–73, 96 (1984)). A score of 1 would mean a perfect correspondence between cognitive ability and job performance. “Standardized tests of cognitive abilities . . . are some of the strongest and most consistent predictors of performance in educational and work settings.” Wax, *supra* note 128, at 641 n.97 (quoting Nathan R. Kuncel & Sarah A. Hezlett, FACT AND FICTION IN COGNITIVE ABILITY TESTING FOR HIRING AND HIRING DECISIONS 339 (2010)).

<sup>134</sup> See Wax, *supra* note 128, at 642.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 641 & n.97.

<sup>137</sup> *Id.* at 641.

<sup>138</sup> See Goldstein, Scherbaum & Yusko, *supra* note 133, at 117 (citing Sternberg, Wagner, Williams and Horvath).

measures of personality, including integrity and conscientiousness, are significantly less valid as predictors of success.<sup>139</sup> No evidence was presented in *Ricci*, she further writes, that “command presence” in oral interviews was as valid as the written test as a measure of merit for promotion.<sup>140</sup> Indeed, she reports, assessment center batteries, which put candidates in simulated job situations and which are widely used in tests for firefighter and police officers, correlate with job performance at a level of .25–.39, a rate substantially lower than the .50 correlation between cognitive ability and jobs generally.<sup>141</sup> Believing that intelligence is dispensable is, in Wax’s words, just “wishful thinking.”<sup>142</sup> And so, she concludes, is the idea that the number of years of schooling can substitute for test score performance as a measure of learning power: only what the person can do counts.<sup>143</sup>

Since, as we shall see shortly, demonstrated cognitive skills do not currently correspond with our racial identity values, when the University of Arkansas is seeking faculty candidates who will fill its diversity and excellence needs, there is often at the micro level an inherent tension between the two. At the macro level in the United States there is, unavoidably in Wax’ words, a “validity-diversity tradeoff.”<sup>144</sup>

We come now to the most unsettling part of Wax’s report: on average, black students underperform whites on cognitive tests by fifteen points.<sup>145</sup> Their scores are in fact one full standard deviation below that of whites.<sup>146</sup> And all of this shows up in school performance, with the average black twelfth-grader reading at an eighth-grade level.<sup>147</sup> According to Orlando Patterson, the race gap on

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<sup>139</sup> See Wax, *supra* note 128, at 643. The problem with using, say, ability to work with others in hiring is that, because that trait is not measurable, it allows inappropriate factors to enter the calculus. See Hellman, *supra* note 32, at 21.

<sup>140</sup> See Wax, *supra* note 128, at 654–55.

<sup>141</sup> See *id.* at 655–56. Wax is not saying here that assessment centers should not be used.

<sup>142</sup> See *id.* at 656.

<sup>143</sup> See *id.* at 648, 687.

<sup>144</sup> See *id.* at 644.

<sup>145</sup> See *id.* at 644–45 & n.103.

<sup>146</sup> See *id.* at 645.

<sup>147</sup> See *id.* at 648.

the Armed Forces Qualification Test, explains almost all of the wage disparity between Euro and African Americans.<sup>148</sup>

Bad schools are undoubtedly a part of the problem, but only one part. The gap appears before school starts when black children perform one full standard deviation lower than white children on word recognition tests.<sup>149</sup> The gap, moreover, is no smaller in our top schools and seem greatest where the parent or parents are college graduates.<sup>150</sup> Black students at college earn grades that are two-thirds of a point below those of whites.<sup>151</sup> In the first year of law school, moreover, the median grade of African American students is in the

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<sup>148</sup> See PATTERSON, *supra* note 54, at 127 (citing the work of Derek Neal and William Johnson). According to Harvard professor Ronald F. Ferguson, who is black, economic disparities are “due to differences in knowledge and behavior disparities [which outweigh] other “proximate causes.” See FERGUSON, TOWARD EXCELLENCE WITH EQUITY 10 (2007); JUNE O’NEIL & DAVID O’NEIL, THE DECLINING IMPORTANCE OF RACE AND GENDER IN THE LABOR MARKET: THE ROLE OF ANTI-DISCRIMINATION POLICIES AND OTHER FACTORS (2012) (reporting more stunningly that gaps in human capital qualities, including standardized test scores, explain virtually all differences in white-black earnings).

<sup>149</sup> See NIELI, *supra* note 32, at 155.

<sup>150</sup> Very little data is publicly available on white/black performance in our schools, but one study, involving Shaker High School, sheds some light on this dim subject. The author is John Ogbu, a prominent black researcher who taught at the University of California-Berkeley. See *generally* JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT (Psychology Press 2003). Describing the school as one of the best in the country and the community as middle and upper-middle class, as well as fully integrated, he found that 78% of the white youngsters graduated with honors compared to 2.5% of the black students. See *id.* at xii, 7. At the same time, blacks made up 90% of the bottom quintile of the class. See *id.* at 7. If there is any good news coming out of Ogbu’s report, it is that there is no hint of racism of any kind at Shaker High. The mean GPA for white students at Shaker High is B+ compared to C+ for African Americans. See FERGUSON, *supra* note 148, at 150. With regard to the racial test gap between white and black children of college graduates, see *id.* at 280–81.

<sup>151</sup> See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Phillips eds., 1998). These data are dated to be sure, but I have not yet been able to find more current information that is as broad-based. A more recent and more narrow study of elite colleges found that one-half of black students and one-third of Hispanic students graduated in the bottom 20% of their class. See Thomas J. Espenshade, *Moving Beyond Affirmative Action*, N.Y. TIMES, Oct. 5, 2012, at A25.

lowest decile of all students' grades.<sup>152</sup> If evidence is needed that Africans Americans are a disadvantaged population, this is it. Here is the calamitous reality of American educational life that test critics like Guinier, Sturm, Peller, and Delgado resist facing: testing is not the heart of the problem; prospective black job candidates are *on average* uncompetitive with whites.<sup>153</sup> American society and the black community in particular need to grapple with this, and the evidence is developing that test score gaps are closely tied to differences in cultural capital and family structure.<sup>154</sup>

But one does not even have to start with gaps in learning skills, Wax continues, to get at race-based work-effectiveness gaps; independent measures of *actual* job performance indicate a gap of almost one-third of a standard deviation, across jobs.<sup>155</sup> To be sure, this datum invites questions about possible racial bias of raters. However, a "large literature," and "the expert consensus," Wax reports, holds that racial bias plays only a marginal role in subjective assessments.<sup>156</sup>

Here is a welcome finding for those fearing that African Americans are routinely discriminated against in the workplace. To be sure, Wax's judgment may be a bit hasty, given the evidence of bias at the hiring level.<sup>157</sup> In the study cited by Wax, for example, the researchers found that often there are "significant differences between white and black mean ratings, to the disadvantage of the black ratees."<sup>158</sup> On the other hand, the researchers cited by Wax found the *overall* variance to be small.<sup>159</sup> In another cited study the authors point

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<sup>152</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 426–27 (2004).

<sup>153</sup> See Wax, *supra* note 128, at 637.

<sup>154</sup> See *id.* at 650. In Shaker High School, 52 % of black male students but only 8% of white male students lived with "one parent or neither." See FERGUSON, *supra* note 148, at 48. Ferguson also reports that white students are twice as likely as blacks to have parents who are college graduates. *Id.*

<sup>155</sup> See *id.* at 649 (emphasis added).

<sup>156</sup> See *id.* at 682–83.

<sup>157</sup> See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 163–68 (Psychology Press 2010); FERGUSON, *supra* note 148, at 26.

<sup>158</sup> Frank Landy, *Performance Ratings: Then and Now* in ADVERSE IMPACT, at 235. This would seem to mean that some black employees are favored in supervisor ratings.

<sup>159</sup> See *id.*



to methodological problems in evaluating racial bias in performance ratings,<sup>160</sup> although again they conclude that *on balance* ratings seem to be fair.<sup>161</sup> In clearer support of her overall findings, Wax cites a study showing a strong correlation between subjective determinations of work performance and such objective measures as absenteeism, tardiness, and work errors.<sup>162</sup> In any event, to the extent that work-based ratings across racial boundaries are unreliable, the need grows for more objective tests of performance.

Neither Guinier nor Sturm has responded to Wax as yet. What might they say? Presumably that since it is on the job where people learn what is needed, deficits in education are not relevant. If you hire and train them, they will succeed. The problem with this view is that in an era of high unemployment there are reportedly hundreds of thousands of jobs that go begging because potential employees are not adequately trained and employers seem not able or willing to shoulder that burden.<sup>163</sup> Job seekers have not learned enough in school.

“Your school may have done away with winners and losers,” Bill Gates is widely—though wrongly—reported to have warned, “but life has not. In some schools, they have abolished failing grades and they’ll give you as many times as you want to get the right answer. This doesn’t bear the slightest resemblance to anything in real life.”<sup>164</sup> If the sentiment here is right, this is again an argument for greater not lesser use of tests, which does not help test critics.

The foregoing discussion deals with the general relationship between testing and performance. It cannot be surprising that critics have trained their sights on the bar exam and the LSAT.

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<sup>160</sup> See Wax, *supra* note 128, at 683.

<sup>161</sup> “Altogether, it would appear that black-white differences in job performance ratings are attributable, on average, to actual differences in job performance rather than to rater bias.” *Id.* at 684, n.225 (quoting James L. Outtz & Daniel A. Newman, *A Theory of Adverse Impact*, in *ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION* 53, 77 (James L. Outtz ed., 2010)).

<sup>162</sup> See Wax, *supra* note 128, at 683.

<sup>163</sup> CBS News reports that there are 3,000,000 jobs waiting to be filled by qualified personnel, 500,000 in manufacturing alone. See *Three Million Open Jobs in the U.S., But Who’s Qualified?* (CBS News television broadcast Nov. 11, 2012).

<sup>164</sup> A version of this much-circulated trope has been promoted by the likes of Ann Landers; however, creative credit should go to Charles J. Sykes, author of *50 RULES KIDS WON’T LEARN IN SCHOOL* (2007). See *Some Kids Won’t Learn in School*, SNOPE (Dec. 5, 2012), <http://www.snopes.com/politics/soapbox/schoolrules.asp> (last visited Apr. 5, 2013).

#### IV. TESTING THE BAR EXAM

Maybe employers will hire and train *some* people who come to the job tabula rasa. But do beginning *lawyers* need to know anything? Or is lawyer ignorance of the law also to be excused, perhaps on a theory that in the age of the computer everything can be looked up? “Once their research skills are in place,” wrote the late critical race theorist Derrick Bell, “students are aware that they have the capacity to learn, relatively quickly, whatever they need or want to know regarding any legal question.”<sup>165</sup> If it is the obsessive know-it-alls who are inheriting the earth these days, as is said, what are the implications of Bell’s views on the bar exam?

First, however, a historical perspective on bar admission, which throws an unflattering light on our predecessors and highlights the need for clear-headedness and honesty. Bar testing began about 1870, when mass immigration into the United States began, and was in use in most states by the 1920s, when strong anti-immigrant sentiment led to closing of the immigration door.<sup>166</sup> The connection between testing, immigration and bar admission need not be merely inferred. In the early twentieth century, the bar was already expressing great concern over the quality of new applicants for admission, especially immigrants and their families and individuals of mixed-race parentage.<sup>167</sup>

The American Bar Association (ABA) had in fact earlier resolved “to admit no men [sic] who would not be worthy members.”<sup>168</sup> After the American Bar Association, a then whites-only fraternity, had unwittingly admitted three black lawyers, the ABA asked its membership to vote on possible expulsion, emphasizing to the

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<sup>165</sup> Derrick Bell, *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U. L. REV. 1039, 1045 (1998).

<sup>166</sup> See Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1200 (1995).

<sup>167</sup> See *id.* at 1198, n.40. In an important study of the implications of such applicants practicing law, for example, a committee member called for action to protect the political and legal order against the “influx of foreigners’ . . . [who] comprised an uneducated mass of men who have no conception of our constitutional government.” See Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363, 396 (1998) (quoting JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 114 (1976) (citation omitted)).

<sup>168</sup> See Roithmayr, *supra* note 167, at 393 (citation omitted).

membership the importance of “keeping pure the Anglo-Saxon race.”<sup>169</sup> There is no denying that the LSAT, developed in 1947, can be traced to these themes. So can the ABA’s unsuccessful efforts to eliminate night schools and part-time programs, which were serving the needs of racial and ethnic minorities.<sup>170</sup>

That the origin of testing for admission to the bar is tainted does not, however, mean that admission should be indiscriminate. As state supreme courts such as Florida’s have indicated, because many law graduates lack the requisite skills (and perhaps moral sensibility) and the public likely lacks the ability to assess those skills, initial screening of lawyers is necessary.<sup>171</sup>

This brings us to modern-era bar exam critics. In a 1989 article, calling for a Title VII review, Professor W. Sherman Rogers assailed the bar exam for failing to predict lawyer success, specifically arguing that the bar exam is designed to further the interest of the profession, and not, as claimed, that of the public;<sup>172</sup> that “[t]he legal profession can best protect the public from incompetent lawyers by vigorous enforcement of the Code of Professional Responsibility and by assisting attorneys in obtaining malpractice insurance at reasonable rates;” that the bar exam discriminates against minorities through its disparate passage rates; that what is at stake is “equality of opportunity;” and that the bar exam should be subjected to a Title VII review.<sup>173</sup>

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<sup>169</sup> See *id.* at 398 (citation omitted).

<sup>170</sup> See *id.*

<sup>171</sup> See, e.g., Amendments to Rules of the Supreme Court Relating to Admissions to the Bar, 843 So.2d 245 (2003).

<sup>172</sup> See W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW L.J. 563, 622 (1989). “All professions are conspiracies against the laity.” GEORGE BERNARD SHAW, *THE DOCTOR’S DILEMMA* 29 (Akasha Classics 2008) (1906).

<sup>173</sup> See Rogers, *supra* note 172, at 624–25. (Rogers is currently a professor at Howard Law School). For other critiques of the bar exam, see Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT’L BLACK L.J. 63 (2004); Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996) (arguing that law schools need to make sure that they are reaching minorities); Milo Colton, “*What Is Wrong with the Texas Bar Exam? A Minority Report*,” 28 T. MARSHALL L. REV. 53, 74 (2002) (arguing that because of disparities in results, the bar exam “promotes and perpetuates a racist and sexist atmosphere” in Texas and that the medical profession has done much better by minority students by giving “heavier emphasis” to a “bedside manner.”).

A Title VII review is unobjectionable. Indeed this entire Article serves that function.<sup>174</sup> In other respects Rogers misses the mark. The argument that the relatively low bar exam passage rates are designed to further the interests of the practicing bar by reducing competition will not persuade those test critics who oppose the bar exam for screening out minority lawyers who otherwise would be serving *underserved* communities.<sup>175</sup> As for the Code of Professional Responsibility, why would lawyers support one if they are interested only in group self-protection? The Code allows lawyers to be disciplined and even disbarred.<sup>176</sup> Regarding malpractice insurance, short of insuring lawyers itself, it is hard to know what the bar could do. That the bar exam disproportionately excludes minorities does not make it discriminatory in any meaningful sense if, a big *if*, minorities are disproportionately underprepared for law practice, a matter to be discussed below. Most important, perhaps, an argument in the form of two questions: would Rogers reject regulation of professional entry for his doctor, architect, exterminator, or locksmith? Are law graduates wiser, more honorable, less destructive?

In 2002, the self-billed largest group of American law academics, the 700-member strong Society of American Law Teachers (SALT), pounced on the bar exam for “inaccurately measur[ing] professional competence to practice law” by failing to show “in any meaningful way” whether those who pass the exam will be “minimally competent to practice law.”<sup>177</sup>

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<sup>174</sup> The courts have not as yet held that Title VII applies to bar exams. *See, e.g.*, *Woodward v. Va. Bd. of Bar Exam’rs*, 420 F. Supp. 211 (E.D. Va. 1976) (holding that the bar exam serves a different function from that employed in *Griggs*).

<sup>175</sup> *See infra* note 190 and accompanying text. Whether or not the legal profession primarily operates to limit competition is, to be sure, a large question that cannot be evaluated in this essay. For a brief discussion, *see infra* note 269 and accompanying text.

<sup>176</sup> *See Rogers, supra* note 173, at 591, 624–25.

<sup>177</sup> *See* Andrea Curcio, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446–48 (2002). A representative of the organization provided the information on membership to me. In another part of the statement, SALT complains that the bar exam has had too much influence in shaping the curriculum. *See id.* at 448–49. The easy solution to that problem would be to broaden the exam base to include such courses as antitrust, tax, rights of the poor and social security disability law while reducing the pass score. That would mean a greater burden on students preparing for the bar. Since it does not seem likely that the results on such a bar exam would be appreciably different from the current one, I deal no further with that issue here.

According to the SALT critique, the bar exam is invalid for the following reasons: it puts a premium on memorization, instead of on understanding, which in turn leads to judicial sanctions and malpractice claims as newly minted lawyers rely on memory and fail to look things up; it uses timed multiple choice questions that are entirely unrepresentative of the problems and conditions facing lawyers; it prepares generalists when practice is largely in the hands of specialists; it produces a bar review industry which costs students thousands of dollars to learn “tricks;” it takes an especially high toll on minorities; and it fails to test ability to “perform legal research, conduct factual investigations, communicate orally, counsel clients, and negotiate.”<sup>178</sup>

Beyond that, says SALT, the bar exam fails to test for “empathy for the client, problem-solving skills . . . commitment to public service work, or the likelihood that the applicant will work with underserved communities.”<sup>179</sup> And since bar failure also reflects ill on the school, if only through U.S. News & World Report, schools’ admissions policies will be tied to the bar exam.<sup>180</sup> Law schools will be reluctant to admit applicants at risk of failing the exam.<sup>181</sup> Finally, says SALT, of African Americans who took the bar exam and failed, 11% did not retake it.<sup>182</sup> In sum, the bar exam stands in the way of those who are competent to practice law, especially minorities.<sup>183</sup>

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<sup>178</sup> See *id.* at 447–50.

<sup>179</sup> See *id.* at 447.

<sup>180</sup> See *id.* at 449.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.* at 450 n.8.

<sup>183</sup> To this bill of particulars, Dean Kristin Booth Glen, a major bar exam critic, adds another: that the bar exam does not protect against disciplinary complaints and malpractice. See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 361 (2003). Can any professional licensing exam do that? Glen also charges that the bar exam does not test administrative law, which is the “single subject most commonly encountered by lawyers in our state.” See *id.* at 360 (referring to New York). But, if so, Occam’s Razor cuts in the direction of including it as a bar subject area. For more on Glen, see *infra* Part IV. Reference to “MacCrate” in Glen’s title is to the widely honored study, which chastised law schools for neglecting practice skills in the curriculum. See *infra* note 216. The bar exam was not testing these skills, either. See AM. BAR ASSOC., SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES (1992).

A few general responses first to contextualize the discussion. If there is a constituency today for allowing law graduates to practice without attending law school, it is tiny and quiescent. There is reason to suppose, therefore, that most lawyers believe that law schools must be teaching something useful in practice. If the bar exam fairly tests much of *that* knowledge—no one, it appears, claims that the bar exam is not largely founded on what is learned or could be learned in law school by taking the right mix of courses—then even if not a comprehensive measure of what lawyers should know, the bar exam should be a meaningful measure of learning.<sup>184</sup>

As to the relevance of the bar exam to practice, the multi-state bar examiners engage a diverse group of people to make up and screen test items. Law professors are, of course, included; so are practitioners and testing experts.<sup>185</sup> Following administration of the bar exam, testing experts carefully review answers, and if they fail to meet psychometric standards, they are eliminated.<sup>186</sup> The bar exam has also been subjected to a major test of validity and reliability by the American Bar Association, with no little attention given to evaluating racial disparities.<sup>187</sup> It is hard to imagine that the test is *not* meaningful. In fact, it is difficult to imagine a more effective way of developing a valid bar exam.<sup>188</sup>

Even if the bar exam fails to test what is relevant in practice, a hypothesis to be discussed below, the exam does, by spelling out areas to be tested, test the ability to learn. In this respect, it almost does not matter what the bar tests because, by all accounts, the ability to learn and to absorb, retain, and juggle information seems critical to the success of lawyers. Ours, lawyers are normally proud to say, is a learned profession.

It seems fair to conclude, however, that learning is not the core of SALT's concern: "Even if the bar exam were a valid screening device, one would have to ask whether its disproportionate impact on people

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<sup>184</sup> See generally Curcio, *supra* note 177, at 452.

<sup>185</sup> See *Myths and Facts Associated with the MBE*, NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mbe/myths-and-facts-associated-with-the-mbe>.

<sup>186</sup> See *id.*

<sup>187</sup> See STEPHEN P. KLEIN, SUMMARY OF RESEARCH ON THE MULTISTATE BAR EXAMINATION (1993). A current study is certainly in order.

<sup>188</sup> Readers may expect a discussion of the Multistate Performance Test here. I ask their forbearance; we will get there. See *infra* note 218 and accompanying text.

of color could be justified.”<sup>189</sup> Race, again, above all. Indeed, the very first prong of SALT’s stated mission is to “make the legal profession more inclusive and reflective of the great diversity of this nation.”<sup>190</sup>

By “diversity” SALT seems not to have disadvantaged whites in mind. For in the face of the ABA standard that law schools prepare students “for admission to the bar, and effective and responsible participation in the legal profession,”<sup>191</sup> SALT holds that “law schools’ main goal should *not* be to admit and train students who will pass the bar examination, especially when serving that goal often comes at the expense of admitting students who will be more likely to serve underserved communities.”<sup>192</sup> In short, law schools should be giving the highest priority to minority students in admission even if, by the best measure we have, they will disproportionately not be competent to practice law when they graduate.

We can now better understand SALT’s concern with the bar exam. In a six-year study of bar passage, SALT reports, African American lawyers passed the bar the first time at a 61% rate as compared with 92% for whites.<sup>193</sup> A few years later the gaps had seemingly not shrunk.<sup>194</sup> More recent data is hard to come by on this sensitive subject, but we know that in July of 2011 the respective black/white first-time pass rates in California for ABA approved schools were, respectively, roughly 58% and 81%.<sup>195</sup>

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<sup>189</sup> See Curcio, *supra* note 177, at 451. The readers should specially note the use of contrary to fact subjunctive.

<sup>190</sup> The second and third planks of SALT’s mission are, respectively, to “enhance the quality of legal education by advancing social justice within the curriculum and promoting innovative teaching methodologies” and “extend the power of law to underserved individuals and communities.” *Mission*, SOCIETY OF AMERICAN LAW TEACHERS, <http://www.saltlaw.org/contents/view/mission>.

<sup>191</sup> See AM. BAR ASSOC., SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17, § 301(a) (2012).

<sup>192</sup> See Curcio, *supra* note 177, at 449 n.4 (emphasis added).

<sup>193</sup> See *id.* at 450.

<sup>194</sup> See DIANE F. BOSSE, SUMMARY OF THE OCTOBER 2006 REPORT PREPARED BY THE NATIONAL CONFERENCE OF BAR EXAMINERS FOR THE NEW YORK BOARD OF LAW EXAMINERS ENTITLED: IMPACT OF THE INCREASE IN THE PASSING SCORE ON THE NEW YORK BAR EXAMINATION 12 (2006).

<sup>195</sup> GENERAL STATISTICS REPORT JULY 2011 CALIFORNIA BAR EXAMINATION: OVERALL STATISTICS 2 (2011), *available at* <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=PL6VLVgQEIM%3D>.

What SALT fails to acknowledge in its critique is no less important than what it reports. If there is a silver lining in the bar exam cloud, it is this: race itself is not the issue; black students whose grades match those of white students pass the bar at the same rate.<sup>196</sup>

I now turn to the SALT critique in detail. If the bar exam is not at all “meaningful,”<sup>197</sup> must it not be meaningless? There would seem to be no in-between. To begin an answer to this question, I turn to what seems, surprisingly, the only public response to SALT to date. Whatever the bar exam’s shortcomings, writes Touro Law Center Professor Suzanne Darrow-Kleinhaus,<sup>198</sup> it does test such important skills as “reading comprehension and reasoning, identifying and formulating legal issues, organizing information, following directions, and ability to write.”<sup>199</sup> As for the concern with memorization, a critique with venerable racist overtones as well as a distinguished provenance,<sup>200</sup> Darrow-Kleinhaus shows with a vivid sample question that memorizing the rules is not nearly enough.<sup>201</sup>

Even if it were, would it be terrible? One has to have command of the foundational rules in order to appreciate their further elaborations; for these rules point researchers to areas in which they should be focusing their inquiries. This line of reasoning suggests, with all due respect to test critics, that it is ignorance of the rules, not

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<sup>196</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 444–46 (2004).

<sup>197</sup> See Curcio, *supra* note 177 and accompanying text.

<sup>198</sup> See Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442 (2004). Darrow-Kleinhaus, a published author on the bar exam, is the director of academic support at Touro Law School. See *About Touro Law*, TOURO LAW, <http://www.tourolaw.edu/abouttourolaw.bio.aspx?id=8>. See also SUZANNE DARROW-KLEINHAUS, *ACING THE BAR EXAM* (West Academic Publishing 2008); SUZANNE DARROW-KLEINHAUS, *THE BAR EXAM IN A NUTSHELL* (West 2003).

<sup>199</sup> See Darrow-Kleinhaus, *supra* note 198, at 442.

<sup>200</sup> In an era marked by heavy immigration, and notwithstanding good civil rights values generally, future Chief Justice Harlan Fisk Stone complained about “the influx to the bar of greater numbers of the unfit” who “exhibit racial tendencies toward study by memorization” and display “a mind almost Oriental in its fidelity to the minutiae of the subject without regard to any controlling rule or reason.” See Roithmayr, *supra* note 110, at 397 (quoting Stone) (citations omitted). The reference would seem to be to Talmudic thinking. There is a nice irony here. One-hundred years ago the talents of outsiders were thought to be limited to memorization. Now, the emphasis on memorization supposedly penalizes outsiders.

<sup>201</sup> See Darrow-Kleinhaus, *supra* note 198, at 447–49.



memorization, that is more likely to get lawyers into trouble.<sup>202</sup> Could anyone (other than maybe Descartes) function in this world on a basis of pure reason? Do we not need some databank to feed into our mental computers? Even more to the point of the critique of testing, it is hardly likely that bar exam critics would prefer an exam based solely on aptitude, i.e., reasoning skills. *Griggs*, after all, used precisely such a test.

As for the bar exam's emphasis on timing, surely it is fair to demand that a professional be efficient.<sup>203</sup> Clients will hardly be willing to pay logy lawyers a living wage, which will also allow them to pay back school debt. Regarding multiple choice questions favoring white students, the bar exam can hardly be said to penalize African Americans since their scores on the essay part of the bar exam correlate with those on the multiple choice questions.<sup>204</sup> And no one is suggesting that the essay part of the exam be scrapped.

Moving to the objection to testing general knowledge when lawyers specialize, one wonders what SALT would want. Suppose that the bar exam tested at a higher level on a narrower range of subjects. Would the racial gap likely disappear?

More fundamentally, perhaps, the function of the bar exam is generally to ensure that newly admitted lawyers have the "minimum competency necessary to become a member of the bar."<sup>205</sup> But as Darrow-Kleinhaus also points out, lawyer testing in the basic areas of law practice, contracts, torts, wills, and criminal law, would in fact seem most useful for the many students who end up in small general practices.<sup>206</sup> And law graduates, one might add, gravitate to areas other than the ones in which they start out. One wonders how they could survive in the professional world without formal training, and testing, in contracts, torts, property, and criminal law.

That the bar exam preparation industry drains students, financially, though true and unfortunate, would seem beside the point in an assessment of tests. If minorities are less likely to take a bar prep course, there is no evidence of it.

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<sup>202</sup> See *supra* note 177 and accompanying text.

<sup>203</sup> I am not claiming that the bar exam has the timing issue exactly right and could not be improved in this respect.

<sup>204</sup> See Colton, *supra* note 173, at 59–61.

<sup>205</sup> See, e.g., THE PENNSYLVANIA BOARD OF LAW EXAMINERS, <http://www.pabarexam.org> (last visited Apr. 3, 2013).

<sup>206</sup> See Darrow-Kleinhaus, *supra* note 198, at 451.

A different kind of response is necessary to meet objections regarding legal research, problem-solving, conducting factual investigations, oral communications, and counseling, which are not tested in most doctrinal courses or the bar exam. Clinics, however, teach some of the foregoing skills as well as negotiation and, while there is probably more clustering of clinic grades, no available evidence shows an equality of grades along racial lines in those classes.

Regarding public service, as Darrow-Kleinhaus points out, we are not dealing with a skill and, in any event, public service is something for the student to choose, not the law school, which can and should give students exposure to it and emphasize its importance.<sup>207</sup> Furthermore, one might add, lawyers in public service have to be no less competent than their adversaries if they are to serve their clients well. As for some African American students failing to retake the bar exam,<sup>208</sup> there is a simpler solution than to abolish it.

SALT identifies several acceptable alternatives to the current bar exam. Among them: (1) the diploma privilege; (2) a practical skills teaching term; and (3) a public service alternative.<sup>209</sup> The diploma privilege would allow any graduate of an accredited law school to practice.<sup>210</sup> But there is a problem with assuming that students learn simply by paying tuition to their law schools. Reference here is not just to students playing computer games in class. Instruction by unseasoned law faculty can be problematic and, with tenure protection, incompetent faculty cannot be removed without great difficulty. Instructional problems can be compounded by the absence of a mandatory retirement age for faculty. And of course law schools may be admitting and keeping students lacking the capacity to succeed just for tuition revenue. That SALT would abolish the current bar exam, without substituting another, suggests that we could resolve the student debt crisis by simply eliminating the first year of law school. It confirms the view that lawyers need know nothing about contracts,

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<sup>207</sup> See *id.* at 456–57.

<sup>208</sup> See Curcio, *supra* note 177, at 450 & n.8.

<sup>209</sup> See *id.* at 451–52. For purposes of space, I do not address a fourth alternative, computer-based testing, which would allow students to pick and choose areas to be tested.

<sup>210</sup> See *id.* at 451.

torts, and property; all the weightlessness should be given to knowledge in the knowledge-diversity trade-off.<sup>211</sup>

A practical skills teaching term would add a ten-week term to the law school curriculum and would require satisfactory completion of the course as measured, yes, on tests.<sup>212</sup> Little if any support for this option exists so I move on. The public service alternative seems most in keeping with SALT's objectives; and SALT indeed points to the Canadian public service option, which allows students to show knowledge and skills in a real world environment.<sup>213</sup> As Darrow-Kleinhaus relates, however, that option is not meant to replace the existing bar exam.<sup>214</sup> Nor does the Public Service Alternative Bar Exam (PSABE) proposed by a former CUNY Law School Dean Kristin Booth Glen in a hefty law review article.<sup>215</sup> Citing the SALT Statement and the MacCrate Report,<sup>216</sup> Glen has presented the most elaborate challenge to the bar exam. An entire article is required to do her piece justice and that cannot be done here. Her principal recommendation is that students would spend somewhere between 350 and 400 hours working under supervision of the court system, where they would be evaluated for their ability to practice.<sup>217</sup>

Suffice it to spell out the weaknesses, which presumably have kept Glen's PSABE from being more than an academic fantasy, the proposal says nothing about cost; mentions only legislatures and foundations as funding sources without saying what claim PSABE has to that money in these trying fiscal times; offers no way to ensure that the work experience will be equally rigorous for all students; fails to

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<sup>211</sup> Professor Beverly Moran favors the diploma privilege because it avoids disparate impact on minority students, because students will learn more without the tension of knowing that the bar exam is approaching, and because it encourages lawyers and judges to take more responsibility for legal education because there is no other institution to do so. See Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 653–54 (2000).

<sup>212</sup> See Curcio, *supra* note 177, at 451.

<sup>213</sup> See *id.* at 454. New Hampshire offers some graduating students a chance to opt out of the bar exam. These students, however, must have high grade point averages to enter the program and must achieve high grades in program instruction. See *Daniel Webster Scholar Honors Program*, UNH SCHOOL OF LAW, <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/>.

<sup>214</sup> See Darrow-Kleinhaus, *supra* note 198, at 455–57.

<sup>215</sup> See *supra* note 183.

<sup>216</sup> See Robert MacCrate, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM* (West 1992).

<sup>217</sup> See Glen, *supra* note 183, at 418–19.

mention who the graders would be; and provides no assurance that graders might be willing to deny bar admission to those who had worked under their close supervision for two months or more.

The foregoing alternatives are obviously designed to teach and test lawyering skills. But the bar exam already does that in the Multistate Performance Test (MPT). Almost forty jurisdictions now use the MPT together with multiple choice and essay sections.<sup>218</sup> In this part of the bar exam, candidates may be given a file of documents including a fact pattern, depositions, correspondence, interviews, statutes, and cases. Some of these materials may be irrelevant to the case at hand. Candidates are expected to organize the source information and communicate their thoughts effectively in accordance with the exam instructions.

Here again no data exist suggesting that the grades on this part of the exam are any different from those on other parts. Because there is nothing to go by, one might suppose that racial disparities persist. But if this is wrong, instead of scrapping the bar exam and creating substitute tests for all the aforementioned reasons, it would make more sense to make the MPT the cornerstone of a new bar exam.

Since the SALT statement of 2002, the anti-bar exam insurgency on the left has been strengthened by public choice theorists on the right. According to public choice, far from seeking to benefit the public through regulation, the profession embraces regulation primarily to limit the supply of professionals and thus to enrich themselves.<sup>219</sup> Law professor and Ph.D. economist George Shepherd elaborates on how the bar exam is not needed to screen entry into the profession. For one thing, he argues, many tasks are simple and do not need much expertise.<sup>220</sup> For another, the public can be sufficiently

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<sup>218</sup> Thirty-six jurisdictions currently use the MPT and by 2014 Connecticut and Washington will be added to that list. See *MPT Jurisdictions*, NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpt/mpt-jurisdictions/>.

<sup>219</sup> See MAXWELL L. STEARNS AND TODD ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 52–53 (2009). One study they cite shows that the bar exam adds \$10,000 to the salaries of first-year lawyers and thus to the bill to consumers, a welfare loss of \$3 billion. *Id.* At a recent George Mason public choice workshop I attended, an instructor estimated that 85% of the impetus in the profession for the bar exam was income-based, only 15% for protection of the public.

<sup>220</sup> See George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 103–08 (2003). For what it is worth, Shepherd is white.

protected without requiring passage of the exam as condition of entry into the profession by requiring graduates to take the bar exam and making resulting scores public.<sup>221</sup> Who is to say that Shepherd is wrong on the first count?<sup>222</sup> But presumably because his proposal could permanently stigmatize lawyers, perhaps especially minority lawyers, Shepherd's ideas have not received traction among bar exam critics.

Two recent developments have taken place that require special attention here. First, finding that too many lawyers were not properly prepared for the practice of law,<sup>223</sup> a number of states have considered raising the passing score of the bar exam.<sup>224</sup> In response, for many of the reasons supporting opposition to the bar exam itself, especially the impact on minority graduates, SALT and individual law academics have strongly objected to these proposals.<sup>225</sup> Nevertheless, some tightening has taken place. Florida and New York, among other

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<sup>221</sup> See *id.* at 107, 155. The idea is not quite as preposterous as it may sound. In China's honor-centered culture, school grades are posted for all to see. The idea presumably is to goad students to study harder, because students know that they cannot hide. In our country, by contrast, we "present everyone as equal, even when they demonstrably are not." STEPHEN T. ASMA, *AGAINST FAIRNESS* 92–93 (2013). You do not have to favor the Chinese system to wonder if this difference is at the heart of China's lead over us in educational outcomes.

<sup>222</sup> The Washington Supreme Court has promulgated rules creating a "limited – license legal technician," effective September 1, 2012, although no specific legal functions have yet been approved for qualified non-lawyers under Admission to Practice Rule 28. See Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11.

<sup>223</sup> See, e.g., Amendments to Rules of the Supreme Court Relating to Admissions to the Bar, 843 So.2d 245 (Fla. 2003). The 1992 MacCrate report itself undoubtedly played a role here. In casting doubt on what law schools were doing to prepare students for law practice, the report could not help but undermine the profession's trust in our law schools and in the bar exam. See MacCrate, *supra* note 216. Consider also: "People are getting into law schools who aren't qualified, and law schools are graduating people who aren't qualified to be lawyers." See William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 551 (2004) (quoting Stuart Duhl, a prior Chair of the National Conference of Bar Examiners).

<sup>224</sup> See *supra*, note 194.

<sup>225</sup> See Curcio, *supra* note 177, at 450–51. See also, e.g., Deborah J. Merritt, Lowell L. Hargen & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2001).

jurisdictions, have raised their bar passage score.<sup>226</sup> Presumably as a result of opposition, the increases in the pass score were limited to only five points.<sup>227</sup>

Second, to give effect to the ABA standards requiring law schools to prepare students for admission to the bar,<sup>228</sup> the ABA in 2008 adopted standards that would tie school accreditation to specific pass rates on the bar exam.<sup>229</sup> Because this raised the stakes of admitting at-risk students, law faculty were here again unsurprisingly quick to object<sup>230</sup> as was SALT.<sup>231</sup>

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<sup>226</sup> See, e.g., BOSSE, *supra* note 194; Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar, 843 So. 2d 245 (Fla. 2003).

<sup>227</sup> See BOSSE, *supra* note 194, at 2.

<sup>228</sup> See *supra* note 191 and accompanying text (referring to Standard 301).

<sup>229</sup> See AM. BAR ASSOC., SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 18–19, § 301-6 (2012). See this in connection with Sander, *supra* note 196, which seems to have played a large role in the ABA's approval of the rule. Reporting substantial gaps between white and black performance in law schools, together with the high dropout and bar failure rates for those who did not measure up in terms of entering credentials, Sander's article suggested to the United States Commission on Civil Rights the need for action to protect minority students. After hearings in 2006, the Commission in 2007 recommended that schools release much more information for the benefit of minority law students and that the ABA eliminate its standard requiring schools to demonstrate their commitment to diversity. See U.S. COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 143–44 (2007). See also *infra* note 264 and accompanying text. It was perhaps the fear of losing its historic accreditation power over law schools that induced the ABA to adopt floors for bar passage.

<sup>230</sup> See Rosin, Gary S., Reports and Comments on Proposed ABA Interpretation 301-6 (Jan. 3, 2008) (unpublished comment), available at <http://ssrn.com/abstract=1080480>; SALT, *Statement on Bar Passage Interpretation 301-6* (Apr. 2, 2011), available at [http://www.saltlaw.org/userfiles/file/StatementOnBarPassageInterpretation\\_Final\\_3-28-11.pdf](http://www.saltlaw.org/userfiles/file/StatementOnBarPassageInterpretation_Final_3-28-11.pdf). See also Tracy Carbasho, *ABA Approves Resolution for Changes in Law School Accreditation Process*, LAW. J., Apr. 11, 2008, at 1 (quoting Temple law professor JoAnne Epps). The National Bar Association and the Hispanic Bar Association also came out against the ABA interpretation. *Id.* at 10.

<sup>231</sup> See SALT, *SALT Statement on Proposed Changes to Increase the Bar Passage Requirements in Interpretation 301-6* (July 6, 2011), available at <http://www.saltlaw.org/userfiles/7-6-11SALTInterpretation301-6.pdf>. The ABA, which, to simplify, requires a minimum bar passage rate of 75 % over a period of three years from the date of graduation or a five year period, three of which resulted in a 75% pass rate, is considering an increase to 80%, not unreasonable given the investment of time and money in a legal education. The SALT

The bar reformers' case, in short, fails to persuade. The best standard for admission to the bar, says Dean Glen, is that candidates be "minimally competent to practice law *unsupervised*."<sup>232</sup> Presumably Glen added the last word in the formula to ensure that students had requisite lawyering skills upon graduation. No argument here that these skills are essential and *should* be tested. However much law students continue to need skills training, how many faculty and student readers of this essay believe that graduates have the writing and doctrinal skills to hit the ground running and practice law *unsupervised*? A large number of lawyers, after all, are in solo practice.<sup>233</sup> This being the case, downgrading the bar exam will not help.

## V. TESTING PREADMISSION TESTS

Eliminating the bar exam would not necessarily lead to more minority students in law school. For that purpose law school admissions policies have to be upended; and, indeed, in December 2003 SALT extended its attack on the validity of the bar exam to the LSAT.<sup>234</sup> It followed this up in 2011 with a statement calling for the repeal of ABA Standard 503, which effectively requires law schools to use the LSAT.<sup>235</sup> Some of the arguments tracked above relating to

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Statement opposes any firm numerical floor on the ground that it would disproportionately affect minority bar passage. *Id.* Professor Shepherd's take on developments like these could be predicted. The accreditation system is the product of "academic racism." *See* Shepherd, *supra* note 220, at 104. The harm is compounded by the attendant expense of maintaining extensive libraries, which makes law school study prohibitive for African Americans. Shepherd calls this "financial racism." *Id.* at 105.

<sup>232</sup> *See* Glen, *supra* note 183, at 347 (emphasis added).

<sup>233</sup> The United States reportedly has 435,000 solo practitioners who make up 48% of those in private practice. *ABA Serves Solo and Small-Firm Lawyers With New Online Resource Center*, ABA NOW (Jan. 19, 2012), <http://www.abanow.org/2012/01/aba-serves-solo-and-small-firm-lawyers-with-new-online-resource-center/>.

<sup>234</sup> Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHNS L. REV. 41, 95 (2006).

<sup>235</sup> SALT, Statement in Support of Eliminating the Requirement for an Admissions Test, (Apr. 2, 2011), *available at* <http://apps.americanbar.org/legaled>

multiple choice questions on the bar exam apply here as well, though given the nature of the LSAT, an argument that the LSAT rewards memorization is not viable.

As for predicting law school grades, SALT first charges that the LSAT—on which the mean white score is 11 points higher than that of African Americans<sup>236</sup>—together with Undergraduate Grade Point Average (UGPA) predicts only 25% of first-year grades.<sup>237</sup> Second, the LSAT does a particularly poor job of predicting grades of African American students because these students are “often” subjected to a “hostile learning environment.”<sup>238</sup> Third, the LSAT hurts minorities because it is conflated in the public mind with merit and intelligence. Last, the weight given to the LSAT is so high that at 75% of schools no more than 30% of the admissions files are read.<sup>239</sup> The result is that far fewer minority students get admitted than should be.

In place of the current LSAT number scale, SALT recommends use of a simplified grading system. LSAT scores would be evaluated as “average,” “above average,” and “below average.”<sup>240</sup> Better yet, given the deficiencies of the LSAT, law schools should use a “whole-file” approach, that is, one in which the entire file of applicants is read so no one is rejected based on numbers alone.<sup>241</sup>

I will not provide a mathematical defense here of the significance of the 25% datum,<sup>242</sup> though I will say that while 25% seems a small

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/committees/Standards%20Review%20documents/20110328\_comment\_admissions\_salt.pdf.

<sup>236</sup> The mean LSAT white score is 153 compared to a mean score of 143 for African Americans. See LAW SCHOOL ADMISSION COUNCIL, LSAT TECHNICAL REPORT 12-03, at 19 (Oct. 2012).

<sup>237</sup> Haddon & Post, *supra* note 234, at 96.

<sup>238</sup> *Id.* at 96–97.

<sup>239</sup> *Id.* at 100.

<sup>240</sup> *Id.* at 88.

<sup>241</sup> This approach, it must be noted, would probably work the most damage on Asian Americans. Of students applying to private colleges in 1997, “African-American applicants with SAT scores of 1150 had the same chances of being accepted as white applicants with 1460s and Asian applicants with perfect 1600s.” See THE DAILY PRINCETONIAN, <http://www.dailyprincetonian.com/2009/10/12> (last visited Feb. 8, 2013).

<sup>242</sup> I will point out that the Law School Admissions Council, which administers the LSAT, claims that the median correlation of the LSAT with first-year grades is 36%. Law School Admission Council, LSAT Scores as Predictor of Law School



number, even those who strongly object to the LSAT have admitted its utility as a predictor of first-year grades<sup>243</sup> and, not parenthetically, that there is a correspondence between LSAT and bar passage.<sup>244</sup> If law schools provide a “hostile racial environment for students” or, as Richard Delgado puts it, “[r]acism at the law schools and in the legal curriculum” might be depressing minority students’ grades,<sup>245</sup> then conceivably the LSAT is over-predicting, not under-predicting their success in the first year, and there would be no injury using it in law school admissions. But SALT’s “hostile learning environment” claim also needs a more full-throated response. The charge is scandalous and destructive and, lacking evidentiary support, seems designed only to take minority students off the hook for not learning enough. SALT should either mind its language or produce evidence.<sup>246</sup>

As for the charge that the LSAT hurts minorities in the public mind, SALT is shooting the messenger. If minorities do less well as a group on exams at all levels of schooling, the public would assume

Performance, <http://www.lsac.org/jd/pdfs/lSAT-score-predictors-of-performance.pdf> (last visited Feb. 25, 2013).

<sup>243</sup> See *infra* note 251 and accompanying text.

<sup>244</sup> See Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. LEGAL PROF. 67 (2008).

<sup>245</sup> Richard Delgado, *Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 644 (2007). The racism in question is reflected, among other places, in “Anglocentric courses and Socratic teaching that . . . reinforce quick responses and a lot of bluffing.” *Id.* I have dealt with the Delgado’s argument at some length in earlier writings. See Dan Subotnik, *Are Law Schools Racist?: A “Talk” with Richard Delgado*, 43 U.S.F. L. REV. 227, 237 (2008); Dan Subotnik, *Are Law Schools Racist?—Part II*, 43 U.S.F. L. REV. 761 (2009). Former president of the American Sociological Association Joe Feagin adds fuel to Delgado’s racial fire claiming that:

Students of color must regularly endure the great pain of racist events at the law schools . . . . [They] must do much emotional work, individually and collectively, just to survive these settings . . . and must decide daily whether and how to reject the white racial framing of everyday events. They may disengage in various ways from the law school experience.

Joe Feagin, *Foreword* to WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* xiv (2008).

<sup>246</sup> For an extensive compilation and analysis of indiscriminate charges of racism by law academics, see DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER AND LAW TALK IN AMERICA* (2005).

that they will also do less well on the LSAT.<sup>247</sup> But since apparently 20% to 30% of files are scrutinized through the whole-file approach, and minorities make up, say, 20% of law school applicants, law schools have an opportunity to find talented students who do not score well on the LSAT.<sup>248</sup> The most obvious problem of a whole-file approach is the expense. Individual law school applications already cost \$60 and more.<sup>249</sup> Do we want to see that doubled or tripled? But perhaps more to the point, since there is no way yet to reliably measure important non-cognitive attributes in a whole-file evaluation, and, most important, since the correlation between LSAT score on the one hand and grades and bar passage on the other is relatively good,<sup>250</sup> the answer for me is no.

Eliminating point scores and substituting ranges is, of course, unfair at the individual level. Suppose the range established for “average” is 150–160 and those scoring over 160 are classified as “above average.” Under the SALT proposal a student who scores 160 will be indistinguishable from one who scored 150. If there are more than a couple of schools that would grade in this rough-hewn manner—or high-scoring applicants who would put up with it—it would be surprising.

The conflict over the LSAT is not abating. The latest and most elaborate plan for predicting lawyer effectiveness comes from University of California Berkeley law professor Marjorie Shultz and psychology professor Sheldon Zedeck (both emeritus).<sup>251</sup> With

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<sup>247</sup> See *supra* notes 144–149 and accompanying text.

<sup>248</sup> See Haddon & Post, *supra* note 234 at 96.

<sup>249</sup> Application fees may range from \$50–\$90. See *An Introduction to Law School Admissions Strategy*, TOP-LAW-SCHOOLS.COM (Jan. 2011), <http://www.top-law-schools.com/law-school-admissions.html>.

<sup>250</sup> Richard Sander reports that at UCLA students in the top 40% of the class have a 98% pass rate, while those in the bottom have a 40% pass rate. See Sander, *supra* note 152, at 443. Haddon and Post themselves agree that often the LSAT has a “statistically significant correlation” to first-year grades. See Haddon & Post, *supra* note 234 at 54. Comparing first-year grades is instructive because students are taking the same courses. Notwithstanding some loose language by these authors, there is, moreover, no evidence that grades for any group go up relative to those of other groups in the last two years of law school.

<sup>251</sup> Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620 (2011). This appears to be a distillation of an earlier piece provisionally released by the authors. Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for*

funding from U.C. Berkeley Law School and the LSAC, among other sources, and concerned about the “adverse impact” of the LSAT and undergraduate grades on “applicants from underrepresented racial/ethnic groups,” the authors in 2011 produced “Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions,” which sought real-world effectiveness factors for law practice.<sup>252</sup> Traditional measures, the authors concede, are good for predicting first-year law school grades but not effectiveness.<sup>253</sup> For that, they note, existing personnel literature places the focus on “agreeable-ness, conscientiousness, neuroticism (emotional stability), and openness to experience.”<sup>254</sup>

To further develop a list of useful character traits for lawyers, Shultz and Zedeck administered questionnaires to hundreds of U. C. Berkeley and Hastings law graduates, asking what qualities they would seek in a lawyer whom they wanted to represent them.<sup>255</sup> Based on the responses, the authors added such traits as stress management, passion and engagement, integrity/honesty, listening, and community involvement and service.<sup>256</sup>

The good news, the authors report from their study, is that race does not generally correlate with the foregoing factors as it does with LSAT and UGPA.<sup>257</sup> Better yet, other factors such “situational judgment,” “biographical data,” and “dispositional optimism,” are better in some ways in predicting lawyer effectiveness than the LSAT and UGPA.<sup>258</sup> Heartened by results, which could allow schools to diversify classes, the researchers call for further research testing their findings.<sup>259</sup>

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*Successful Lawyering* (Sept. 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353554).

<sup>252</sup> Shultz & Zedeck, *supra* note 251, at 620, a1.

<sup>253</sup> *Id.* at 621.

<sup>254</sup> *Id.* at 626. One desperately wants to know whether “neuroticism” was a plus or a minus factor.

<sup>255</sup> *Id.* at 620.

<sup>256</sup> *Id.* at 629.

<sup>257</sup> *Id.* at 652–53.

<sup>258</sup> *Id.* at 653.

<sup>259</sup> *Id.* at 655.

How helpful is Shultz and Zedeck's work to our project? First, and perhaps most important, in assessing responses from respondents about qualities that job applicants should have, they report nothing that sounds like "learned in the law." Can that possibly be irrelevant? Surely for a criminal law litigator, except in extreme circumstances, coping with stress cannot substitute for knowing the elements of crimes or the rules of evidence. Second, traits like agreeable-ness may be developed through instruction. Perhaps law schools should substitute Dale Carnegie courses in the curriculum for antitrust.<sup>260</sup> Third, Shultz and Zedeck provide no comparative weights for the various non-cognitive qualities sought by employers. Fourth, the authors do not say how the relevant traits are to be tested; no sample questions, for example, are provided. Fifth, it would appear that candidate information will be derived to a large extent through self-assessment. What other way is there? But can we expect candidates for admission to law school to effectively assess, say, their own "agreeable-ness" or optimism levels relative to those of their contemporaries? Even if this is knowable by the candidates, surely they will learn to provide the "right" answers from Barrons or other test preparation services.

There is, moreover, something Orwellian in the Shultz and Zedeck project. Even assuming the test will succeed in capturing personal characteristics of candidates for admission to law school, it is hard to imagine that the SALT membership really wants law schools and perhaps employers to know details about the psychological make-up of individuals who have not yet developed professional identities. In any event, Shultz and Zedeck look forward to non-cognitive tests being used together with the LSAT.<sup>261</sup> That would seem to mean that the LSAT is not meaningless.

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<sup>260</sup> See DALE CARNEGIE, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE* (1936). Carnegie's power and success can be measured by the fact that the book is one of the top bestsellers in American history and is still the basis for courses offered around the country. Another and more contemporary candidate for inclusion in such a course would include work by Daniel Goleman. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995). If "agreeable-ness" is teachable, however, it is hard to usefully measure. The resulting "problem," says Deborah Hellman, is that "the discretion necessary for implementing this selection criterion would allow officials to use other traits in its stead—intentionally or unintentionally." DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 21 (2008). Is this what test critics really want?

<sup>261</sup> Shultz & Zedeck, *supra* note 251, at 656.

The latest challenge to the LSAT comes from Professor Paula Lustbader, who begins an article by noting that “African-American . . . enrollment in law schools has declined sharply since 1993,”<sup>262</sup> citing a decline of 7.5% of black students over the intervening period. For Lustbader, here again, the problem is our reliance on poor-predicting tests, especially the LSAT. Like the other critics she insists, “[l]aw schools can ensure inclusive, fair, and just admission without compromising their integrity.”<sup>263</sup>

Can, and should, law schools change their *modi operandi*? My own law school has endeavored for years, with some success, to increase the percentage of African Americans in entering classes. We and many other schools specially encourage minorities to apply, and we admit many students who are at risk. We are almost obliged to; the ABA requires law schools to contribute to the profession’s diversity.<sup>264</sup> And yet, it may be that between dropping out and not passing the bar something like 43% of black students never become certified as lawyers.<sup>265</sup> The fact of the matter—and this cannot be emphasized enough—is that with all the good will in the world, law schools do not know how to identify those students with low traditional academic credentials who, nevertheless, can succeed.

In arguing their case for more open admissions, test critics say nothing about the likely resultant burden on many who do make it through law school and the bar exam with many tens of thousands of dollars of debt. Without tight academic standards, too many African

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<sup>262</sup> Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 71 (2012).

<sup>263</sup> *Id.* at 146.

<sup>264</sup> ABA Standard 212 Equal Opportunity and Diversity states:

[A] law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

Interpretation 212-3 goes on to require “special concern for determining the potential of these applicants through the admissions process.” *Id.*

<sup>265</sup> Sander, *supra* note 152, at 454. For obvious reasons, there are not a lot of data here. In some years the never-pass rate for minority graduates of law schools taking the California bar has depressingly reached 45%. See Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 20 (2010).

Americans would find themselves at the bottom of the knowledge curve with limited earning potential in a current environment in which there are reportedly only enough jobs for half the lawyers that law schools produce.<sup>266</sup> All in the name of—we have heard this word before—inclusiveness.

One can understand the strategy of test critics. By touting inclusiveness sometimes referred to as “providing access”—a goal that appears frequently in the test literature—they are claiming the moral high ground. Exclusion means Apartheid, racial covenants, barbed wire; inclusion means family, belonging, and good will towards men and women. Inclusion, then, is good, exclusion bad. But is this useful? I am excluded from joining the Navy because I am too old; excluded from driving because I cannot see well; excluded from the beach because I am not a resident; excluded from a N.Y. Mets game because I cannot afford the price of a ticket; excluded from the United States because I am a Mexican citizen. Though I lack moral defects, there are arguably good reasons for all these exclusions.

In this light, it is hard to see who law schools are supposed to admit “without compromising their integrity”<sup>267</sup> when traditional credentials are the only valid, even if far from perfect, predictors. Can all who dream of being a lawyer be one? Seeming to understand her unpersuasiveness, especially given today’s harsh market realities, Lustbader moves away from cold statistics. Instead, she touts (cherry-picks?) the personal stories of minority students who became attorneys, love their work, are good at it, and make a respectable living.<sup>268</sup> One could respond that all students who really dream of becoming lawyers will work especially hard to avoid failure and realize their aspirations, but the point will not be pushed.<sup>269</sup>

Admissions, however, is a statistical game precisely because the predictors are imperfect. While we do need supplemental measures for prediction to get students who can make it through law school into the

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<sup>266</sup> In 2009, there were twice as many graduates passing the bar as there were jobs for them. See Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at A10.

<sup>267</sup> See Lustbader, *supra* note 262, at 146.

<sup>268</sup> *Id.* at 147–48.

<sup>269</sup> Lustbader’s argument is, to be sure, appealing in some ways. There is no greater satisfaction for a law professor, I readily admit, than to see students enter law school with few traditional credentials and with strong doubts as to their own abilities, and then exit after achieving their dream and perhaps routing the competition.

profession, we also need to know about those who cannot. Hard as it is to take in, there are apparently 150,000 law school graduates who have never passed the bar exam,<sup>270</sup> and they deserved the law schools' best judgment regarding their likely success as much as do those more likely to succeed. Ethical issues are not the only ones in play. Who is going to defend the law schools when these students sue, claiming that they were taken advantage of much like the borrowers in the housing debacle who succumbed to the blandishments of the mortgage brokers? The larger point is that law schools need to think harder about these students. Test critics, only somewhat understandably, completely ignore their existence.

Professor Richard Delgado stands out as an exception. For him, the African American who fails to make it all the way through the bar exam can still contribute as an "organic intellectual."<sup>271</sup> Knowing the circumstances of failure, however, would others likely give such scholars' contributions serious consideration?

Delgado says nothing about the psychic and financial dimension of failure. Suggesting that the legal enterprise, which dwells on "*legal conflict*," needs to be expanded to cover "*law-related psychological well-being*,"<sup>272</sup> however, Therapeutic Jurisprudence counsels against allowing such concern to be swept under the rug. It is easy to imagine the trauma of students who have been successful throughout their school years—until they get to law school. The search for psychological data on these students, however, is frustrating. The only known study on the subject reports that men experience higher rates of divorce and lower rates of marriage and parenthood.<sup>273</sup>

This same study deals comprehensively with the financial questions. Students who never pass the bar will not pay off their school debt until they are in their forties.<sup>274</sup> Their incomes will lag behind that of college graduates generally until they reach their late thirties. After that their incomes will be higher than those of college graduates but their median income will be in the 25<sup>th</sup> percentile of

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<sup>270</sup> See Yakowitz, *supra* note 265, at 3.

<sup>271</sup> See Delgado, *supra* note 245, at 648.

<sup>272</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JUSTICE: LAW AS A HELPING PROFESSION 47 (2000).

<sup>273</sup> See Yakowitz, *supra* note 265, at 37–38.

<sup>274</sup> *Id.* at 39. Readers should approach this study with special caution. Some of the data it uses are almost 20 years old. Of special concern are the median debt levels for law graduates.

lawyers.<sup>275</sup> The author of the study asks whether, on balance, and looking retrospectively, law school was a good investment for these students. She concludes that “law school didn’t begin to pay dividends until the latter half of their careers, and *likely couldn’t ‘pay back’ the harms that the [law school] experience caused during the first half.*”<sup>276</sup>

The concerned citizen is also obliged to look at those who do not make the cut *into* school. So let me expand the anecdotal range a bit and ask readers: How many of you would have been crushed if you had not had the chance to become a lawyer? Are you not resourceful enough to have found other things to do which provided no less, and maybe more, satisfaction? Not every dream, surely, should be fetishized—a point made by Martin Luther King, Jr., who knew about dreams.

Early in adulthood, according to Richard Delgado, Dr. King was hoping to get a Ph.D. in sociology.<sup>277</sup> After receiving poor grades on the quantitative parts of the GREs, however, he dropped the idea. Delgado thinks that Dr. King should have been encouraged to continue with his studies instead of moving on to theology.<sup>278</sup> Perhaps so. But Dr. King presumably made the decision by himself. In any event, the message he extracted from his experience could not be more different from the one extracted by Delgado. When he was in college, Dr. King reported, he could not get some basic ideas in statistics, such as calculating the mean, median and mode, as quickly as some of his classmates. “I was not willing to accept myself,” he explains his thinking at the time. But later he came to a realization: “A Ford trying to be a Cadillac is absurd, but if a Ford will accept itself as a Ford, it can do many things that a Cadillac cannot do: it can get in parking spaces that a Cadillac could never do.”<sup>279</sup> Not to mention write better speeches.

In the end, however shaky SALT’s critique of the LSAT, it is in the area of law school grades where their arguments fall completely flat. Again, the LSAT is the best predictor of first-year grades, as

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<sup>275</sup> *Id.* at 4.

<sup>276</sup> *Id.* at 39 (emphasis added).

<sup>277</sup> See Delgado, *supra* note 245, at 648.

<sup>278</sup> *Id.*

<sup>279</sup> Dr. Martin Luther King, *The Three Dimensions of a Completed Life* (April 9 1967) available at <http://www.drmartinlutherkingjr.com/thethreedimensionsofa-completelife.htm>.



Schultz and Zedeck acknowledge.<sup>280</sup> Others have shown that grades are the best predictors of bar exam success.<sup>281</sup> Kris Glen has attacked the LSAT and bar exam for not being sufficiently different from one another,<sup>282</sup> but she holds back from a separate attack on grades. Why? Presumably because they signal ambition, stick-to-it-iveness, and attention to detail. Or, as a new study suggests, “[m]otivation, diligence, exactitude, energy, learning, previously acquired human capital, [and] competitiveness,”<sup>283</sup> are qualities that are indices of probable success in virtually all endeavors. Specifically in the world of law practice, the study continues, “grades are a powerful predictor of earnings and promotion in the short-term, and maintain or increase their strength in the longer term.”<sup>284</sup>

Novelist Jeremy Blachman spells out an ingenious argument for the importance of grades. Speaking of recruitment strategies for litigation positions, one of his characters explains: “[w]e want attorneys able to figure out how to get an A on a law school exam, because if they can’t figure that out, how can we expect them to get a judge to buy their arguments.”<sup>285</sup> Unsurprisingly, SALT has not attacked grades.

One much-cited study, to be sure, has shown that grades of African American graduates of the University of Michigan law school bear little if any relation to any measure of success in practice, but no

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<sup>280</sup> See Shultz & Zedeck, *supra* note 251, at 621.

<sup>281</sup> See Sander, *supra* note 152, at 443. LSAT also scores have a “predictive effect for bar passage.” Kristin Booth Glen, *Where and When We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1705 (2002).

<sup>282</sup> See Glen, *supra* note 183, at 357.

[I]f you take students who know how to take a test format exactly like the bar exam, and know how to take it successfully, [as the LSAC study tells us is the case with the LSAT,] you don’t have to do much with those students in law school in order to assure their success on the bar exam.

*Id.* The analogy between the bar exam and the LSAT, of course, is not as simple as suggested. The LSAT is designed to test aptitude and the bar exam aims at knowledge.

<sup>283</sup> See Richard Sander and Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL STUDIES 893, 922 (2012).

<sup>284</sup> *Id.* at 925. The authors make clear that in explaining earnings distinctions an elite school degree has “little or no analytic content.” *Id.*

<sup>285</sup> JEREMY BLACHMAN, ANONYMOUS LAWYER 215 (2007).

evidence exists that this good news can be extrapolated to other elite or non-elite schools.<sup>286</sup> Are critics ready to generalize that law school grades do not matter? *Is this what they are teaching their law students? Their own children?* If so, this is the debate that should be taking place.

We are back to the American calamity. We do not know how to motivate our black youth to earn high grades. And our ignorance shows consistently across the board.

## VI. TESTING THE SOCIOECONOMY

Deviating from facially neutral historical merit-based standards has created enormous political and social tensions.<sup>287</sup> To see why, one need consider only some constitutional theory and the politics of affirmative action. For the late Alexander Bickel, the “history of the racial quota is a history of subjugation, not of benevolence . . . a creator of castes.”<sup>288</sup> For all its ostensible liberal provenance, according to neo-conservative guru Norman Podhoretz, affirmative action represents a “reversion to a state of affairs under which the individual was once again to be looked at as a member of a group . . . and dealt with on that basis alone[,] the very state of affairs that the American Revolution was fought to overturn.”<sup>289</sup> Distinguished conservative scholar Thomas Sowell similarly holds that affirmative action represents the “quiet repeal of the American Revolution.”<sup>290</sup> Bringing the matter down to earth, Bernard Goldberg writes that “[c]onservatives don’t understand why a black kid, whose father or mother is a doctor or a lawyer, should get extra points on his college admissions application over a white kid whose father is a cop and whose mother is a waitress.”<sup>291</sup>

<sup>286</sup> See David L. Chambers et al., *Michigan’s Minority Graduates in Practice: The River Runs through Law School*, 25 LAW & SOC. INQUIRY 395, 395 (2000).

<sup>287</sup> WILLIAM M. LEITER & SAMUEL LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY 29 (2nd ed. 2011) (quoting JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY 23 (1998) (“[T]he unifying moral vision of civil rights has given way to ‘a divisive nightmare of race’”).

<sup>288</sup> ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 87 (Yale 1977).

<sup>289</sup> NORMAN PODHORETZ, MY LOVE AFFAIR WITH AMERICA 226 (Simon & Schuster 2000). The reference is presumably to English hereditary privilege.

<sup>290</sup> *Id.* at 226 (quoting Sowell).

<sup>291</sup> BERNARD GOLDBERG, CRAZIES TO THE LEFT OF ME, WIMPS TO THE RIGHT: THE U.S. MEDICAL LICENSING EXAMS 20 (HarperCollins 2007). Goldberg is a highly

Political polling reflects these sentiments. To be sure, there is strong and even increasing agreement for affirmative action where that is defined as helping minorities “get better jobs and education.” But when the definition covers whether minorities should get “preferential treatment,” things change. A Pew Research Center poll issued not long before the *Ricci* decision came down found that only 22% of whites agreed with this latter position, compared to 58% of blacks.<sup>292</sup>

The tension over unequal standards shows up in the reaction to the *Ricci* decision: “It was an amazing experience. They [i.e., the white firefighters] were greeted like heroes on the streets, in the hotels, in the restaurants. Everywhere we went, people reached out to them to shake their hands and thank them for what they did.”<sup>293</sup>

That many white New Haveners exulted in this manner surely evidences the frustration of whites who reject what they perceive, not necessarily wrongly, as racial favoritism.<sup>294</sup> So does a more narrow and recent study showing that 52% of Tea Party members, as contrasted with 27% of American adults at large, believe that the problems of African Americans are getting too much attention relative to others.<sup>295</sup> This may be an ungenerous view of the descendants of

honored broadcast journalist. To the children of the doctor or lawyer one could add the children of the black law professor. Calls for preference by their parents notwithstanding any protestations to the contrary, would seem to arise primarily out of filial love and, to use a term from Public Choice theory, rent-seeking.

<sup>292</sup> Pew Research Center Publications, *Public Backs Affirmative Action But Not Minority Preferences* (June 2, 2009), <http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences/>. We should not assume that affirmative action as we understand it today is backed by the African American community. Professor John McWhorter tells of a study showing that 90 percent of blacks rejected the idea of admitting a black student over a white student with a score 25 points higher on the SAT exam. See JOHN C. MCWHORTER, *WINNING THE RACE* 305 (2005).

<sup>293</sup> See McGinley, *supra* note 71, at 581 (2010) (quoting Karen Torre, attorney for *Ricci* plaintiffs). McGinley seems to think that this reaction by the white community in New Haven was shameful. For what it is worth, as a measure of racial animus it was surely no more shocking than the black community's exultation at O. J. Simpson's acquittal for murder.

<sup>294</sup> “Redistribution” of jobs has resulted in a decrease of 10–15% in white male employment in affirmative action environments. See Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. OF ECON. LIT. 483, 506–07 (2000).

<sup>295</sup> RONALD P. FORMISANO, *THE TEA PARTY* 112 (2012). Older readers may be reminded here of the term “benign neglect,” recommended 50 years ago to temper racial strife by then Senator Daniel Patrick Moynihan. See Adam

slaves by some who are descendants of slaveholders, but it is not immoral; a number of black scholars have opposed preferential treatment based on race,<sup>296</sup> while others have held that African Americans are the agents of many of their own problems.<sup>297</sup> Such

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Clymer, *Daniel Patrick Moynihan, Former Senator From New York, Dies at 76*, N.Y. TIMES (Mar. 27, 2003), <http://www.nytimes.com/2003/03/27/obituaries/27MOYN.html>.

<sup>296</sup> “It is morally unjustified—and to this African-American humiliating—that preferential treatment based on race should become institutionalized for those of us now enjoying all the middle-class advantages of middle-class life. The thought that my sons might come to see themselves as ‘presumptively disadvantaged’ because of their race is unbearable to me.” GLENN LOURY, *THE AFFIRMATIVE ACTION DEBATE* 63 (1996). I suspect that Loury no longer holds this view. In the Michigan case, John Hope Franklin actually testified that he did not “support the admission of less qualified minority applicants over more qualified Asian or White applicants.” LARRY PURDY, *GETTING UNDER THE SKIN OF “DIVERSITY”* 10 (2008).

<sup>297</sup> Harvard sociologist Orlando Patterson, who is black, has not hesitated to find fault in black culture. See Orlando Patterson, *Taking Culture Seriously: A Framework and an Afro-American Illustration*, in *CULTURE MATTERS* 202 (2000). Nor has black Harvard sociologist William Julius Wilson, although he insists that external factors such as continued racism are more significant. See WILLIAM J. WILSON, *MORE THAN JUST RACE* 61 (2009). Specifically on the subject of *Ricci*, John C. McWhorter, a professor of linguistics, ties the test gap to the phenomenon that in the lower economic urban (and some white rural) classes, culture is transmitted orally and not through writing. See John McWhorter, *Thinking about “Ricci”: When Black People Don’t Perform as Well on Standardized Tests, What Should be Done?*, THE NEW REPUBLIC (April, 29, 2009), <http://www.newrepublic.com/blog/john-mcwhorter/thinking-about-ricci-when-black-people-dont-perform-well-standardized-tests-what>. McWhorter’s solution is not to drop the tests but to offer training. *Id.*

From another direction, the problem for the black community is not racism, says Podhoretz; it is, rather, “black babies born out of wedlock who grow up without fathers and who are doomed to do badly in school, to get into trouble on the streets, and to wind up in jail.” Norman Podhoretz, *My Negro Problem-and Ours*, COMMENTARY (Feb. 1963), available at <http://www.commentarymagazine.com/article/my-negro-problem-and-ours/>. If it feels wrong to quote a white commentator on this subject, consider Shelby Steele. “Whites don’t think they have the moral authority to ask anything of black people, certainly not to judge them,” he has written. “But there’s something wrong with people who have a 70-percent illegitimacy rate. This is a group of people who are lost,” he concludes; “[b]ut we are surrounded by whites who refuse to tell us that.” Shelby Steele, *The High-Wire Act of Barack Obama*, HOOVER DIGEST, 2008, no. 1 (January 16, 2008). Sowell is no less critical of the “catastrophic decline of the black family.” See SOWELL, *supra* note 48, at 126.

thinking by whites and blacks may well explain the power of conservative talk radio.

If this is right, a holding in *Ricci* that invalidated the successful test results of white firefighters would have risked creating substantial racial conflict. Indeed, if the recently articulated theory that the Supreme Court watches the elections (read: polls)<sup>298</sup> is also right, we may well have the best explanation for *Ricci*: a larger fraction of whites disagrees with “preferential treatment” than the fraction of blacks that agrees.

The spotlight placed on the political right here should not be taken to mean that I ignore the *Ricci* left, many of whom are unhappy about the racial make-up of the New Haven Fire Department, much less that I seek to abolish affirmative action. In 2003 only nine percent of senior officer ranks were African American, only one captain out of twenty-one.<sup>299</sup> More generally, the socioeconomic position of whites on average is clearly and unsettlingly above that of blacks and, whatever Americans deem the cause of the problem, most Americans, as we have just seen, do not believe we should just stand by.<sup>300</sup> What it does mean at the very least is that if we want to define the fairest and most meaningful role for Title VII and affirmative action, we need to understand the *full* costs of making race the *ne plus ultra* factor in employee selection.

Among the costs are those associated with ignoring job preparedness, and these have proved hard to assess. While some

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A considerable literature has arisen in recent years on the subject of “white innocence.” The notion is that whites do not allow themselves to recognize the problems of minorities because they need to see themselves as innocent in racial matters. *See, e.g.*, Cecil J. Hunt, *The Constitutional Rhetoric of White Innocence* (September 21, 2005). *bepress Legal Series*, Working Paper 797 at <http://law.bepress.com/expresso/eps/797> (Hunt was a colleague of mine some years back.); ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010); JENNIFER L. PIERCE, *RACING FOR INNOCENCE* (2012). To the extent that the foregoing analysis is correct, contemporary racial problems may be more attributable to the drive for *black* innocence, a drive that would preclude *African Americans* from accepting any responsibility for racial gaps because that would amount to “blaming the victim.”

<sup>298</sup> *See generally* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

<sup>299</sup> *See Ricci v. DeStefano*, 557 U.S. 557, 610–11 (2009).

<sup>300</sup> *See supra* note 292 and accompanying text.

studies, for example, have concluded that Title VII impairs efficiency,<sup>301</sup> another reports that it enhances efficiency,<sup>302</sup> and yet another holds that the results are ambiguous.<sup>303</sup> A follow-up to this last study reports that affirmative action's costs "appear quite limited," but in a meta-view of this area the reviewer concludes that the finding is "muted" since the authors find "clear evidence of weaker credentials."<sup>304</sup>

In the face of this uncertainty, as indicated above, a new study by the Organisation of Economic Co-Operation and Development (OECD)<sup>305</sup> may be helpful in assessing the cost of learning deficits in the workplace. These emerge from a No. 2-pencil test of mathematics and science administered in OECD countries for many years,<sup>306</sup> called the Programme for International Student Assessment (PISA). This study finds a strong correlation across the globe between success on these tests and a country's economic growth rates, measured in Gross Domestic Product (GDP).<sup>307</sup> This is because the skills in question, which were, again, found to be highly correlated with reading skills, are related to innovation, the driver of economic growth.<sup>308</sup> In other words, the differences in test scores on these exams have significance: not only in our heads and in Sudoku games, Mensa tests, and New York Times Acrostic puzzles, but also in the real world.

The OECD considered years of education—as opposed to test scores—as a proxy for the relationship between GDP growth and cognitive skills, but found no correlation.<sup>309</sup> Only test performance mattered. The OECD also largely rejected geographic, economic and political conditions such as location, value of capital stock, political

<sup>301</sup> See Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 513–21 (1987).

<sup>302</sup> See John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1411–36 (1986).

<sup>303</sup> See Holzer & Neumark, *supra* note 294, at 558.

<sup>304</sup> See Harry J. Holzer & David Neumark, *Affirmative Action: What do We Know?*, 25 J. OF POL'Y ANALYSIS AND MANAGEMENT 463, 484 (2006).

<sup>305</sup> Organization of Economic Co-Operation and Development, *The High Cost of Low Educational Performance: The Long-Run Impact of Improving PISA Scores*, (2010), available at <http://www.oecd.org/pisa/pisaproducts/pisa2006/44417824.pdf>.

<sup>306</sup> *Id.* at 14.

<sup>307</sup> *Id.* at 3.

<sup>308</sup> *Id.* at 12.

<sup>309</sup> *Id.* at 6, 16.

stability, student/faculty ratios and per-pupil spending<sup>310</sup> as not being meaningful for GDP growth.

What does this mean for America? Consider the median PISA scores on a 2003 test for a few selected countries: Finland-544, Belgium-537, Germany-510; and the United States-483.<sup>311</sup> In this setting, undermining the case for the highest educational standards is alarming.

The only good news: a country does not need high levels of natural resources to succeed, and even “relatively small improvements in the skills of a nation’s labour force can have very large impacts on future well-being.”<sup>312</sup> The OECD report estimates that just halving the U.S. cognitive gap with Finland would result in growth to our economy of more than \$40 trillion over the next eighty years in present value terms.<sup>313</sup> If, *mirabile dictu*, we could eliminate that cognitive deficit entirely, we would enjoy annual growth rates that would be about 1% higher than we do now, the result of which would represent a present value over eighty years of more than \$100 trillion in Gross National Product (GNP).<sup>314</sup>

Assuming these data are right, they suggest costs associated with disparate impact and affirmative action that are not often acknowledged; costs that are incurred not only by those who fail to get jobs for which they are better qualified but also by the entire society. Again, this is not to argue for renouncing affirmative action or disparate impact, although it does argue for pruning them.

## VII. CONCLUSION: SENSE AND NESCIENCE

For the last few years the ABA has made racial balance of faculty, a condition it does not define, into a veritable requirement for accreditation.<sup>315</sup> Similarly, the Association of American Law Schools

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<sup>310</sup> *Id.* at 19.

<sup>311</sup> *Id.* at 43.

<sup>312</sup> *Id.* at 3.

<sup>313</sup> *Id.* at 6. The authors of the report use 80 years based on the projected life expectancy of an American born today.

<sup>314</sup> *Id.* at 7.

<sup>315</sup> “Consistent with sound educational policy[,] . . . a law school faculty shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race, and ethnicity.” ABA Standard 212(b), *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/chapter\\_2\\_2012\\_2013\\_aba\\_standards\\_and\\_rules](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_2_2012_2013_aba_standards_and_rules)

(AALS) has issued a Statement of Good Practices for the Recruitment and Retention of Minority Law Faculty Members.<sup>316</sup> The underlying assumption of these policies is that, left on their own, law schools could not help but undervalue minority faculty candidates.

On a similar theory the ABA and AALS have adopted rules requiring minority *student* balance.<sup>317</sup> In such an environment, it should not be surprising that critics would come to assail the bar exam and the legal education establishment for undervaluing the utility of minority lawyers.

No one, it would appear, denies that increasing the number of minority lawyers is an important goal. We have seen, however, that to accomplish this purpose critics have gone too far. A rich irony is served up when legal academics pooh-pooh the importance of learning and educational achievement in economic life. After all, our stock in trade in law school is education. If that has no economic value—and study of the law has clearly lost substantial value recently in the marketplace—we are out of business. A serious question is nevertheless presented: Why have academics pushed back so hard against tests of knowledge in the face not only of their own economic interests but also of the overwhelming arguments brought to bear against them?

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.authcheckdam.pdf. The Association of American Law Schools (AALS), Bylaw Section 6-3(c) articulates the same requirement, without calling for “concrete action.” See AALS, Bylaws, [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php) (last visited Dec. 30, 2012).

<sup>316</sup> Susan Westerberg Prager, *Issuance of a New Statement of Good Practices for the Recruitment and Retention of Minority Law Faculty Member*, ASSOCIATION OF AMERICAN LAW SCHOOLS, <http://aals.org/deansmemos/12files/12-21.pdf> (last visited Dec. 30, 2012). Among suggestions: deans should hire AALS-sponsored consultants to help secure diversity; faculties should look beyond traditional models and venues for minority faculty candidates; deans should hold meetings in which they inform faculty about the importance of diversity after which faculty could discuss the matter. *Id.* Once minorities are hired, schools should be careful of evaluations because minorities are “more harshly judged;” minorities should be placed on committees but not over burdened with committee work; deans should recognize the invisible work that minority faculty do; deans should lead discussion about how bias operates including implicit bias; and deans should value diversity mentoring on the part of the faculty. *Id.*

<sup>317</sup> ABA Standard 212(a) uses essentially the same language for student enrollment as for faculty. See also AALS Bylaw 6-3(c), *supra* note 315.



Consider first African Americans, who *as a group* have frustratingly and for a variety of historical and cultural circumstances—including continuing white racism—been unable yet to catch up educationally with other groups. This situation cannot help but cause immense distress, especially for minority academics. Since, for better and for worse—and whether we will it or not—we are defined in part by our group affiliation, the status of our community has a bearing on our own status as its members. No less important, the test gap is manifested in the very currency of academia—intelligence and intellectual achievement—a currency that, as Shelby Steele hardly needed to remind us, was mocked in pro-slavery ideology.<sup>318</sup> Undermining tests helps mitigate harsh realities.

As for white support for test-bashing, the racial test gap and the historic circumstances that underlie it, Steele continues, have produced considerable guilt in much of the white population, and this has led to countless concessions to demands by black leaders.<sup>319</sup> In playing to black weakness and not promoting strength, he urges, these concessions have proved destructive to the cause of black advancement.<sup>320</sup> The question here for America is whether giving in to critics is useful in the limited area of testing.

It surely is in more than one sense. Discrediting your competitors' achievements can improve your own team's self-esteem and sense of well-being.<sup>321</sup> Dismissing high bar exam scorers as nerds could mean that they are not as personable or cool as you are and so would be unsuccessful rainmakers.

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<sup>318</sup> Shelby Steele, *The Race Not Won*, THE NEW REPUBLIC, Oct. 7, 1996, at 23–26.

<sup>319</sup> SHELBY STEELE, *A DREAM DEFERRED* 120 (1998). Differences in how the drive for White Innocence plays out should be noted. For those favoring preferences, white innocence precludes white attention to the problems besetting minority communities, see *supra* note 297 and accompanying text. For Steele, contrariwise, whites accept, if not welcome, their guilt and then work to expiate it. This explains why, as Thomas Sowell puts it and as is reflected throughout this piece, intellectuals “prefer a moral melodrama, starring themselves on the side of the angels against the forces of evil, rather than a mundane case of elementary economics that would leave intellectuals largely irrelevant.” See SOWELL, *supra* note 48, at 133. For an elaborate treatment of this subject, see SOWELL, *THE VISION OF THE ANOINTED* (1995).

<sup>320</sup> See STEELE, *supra* note 319, at 11, 20, 24, 11, 20, 24, 34, 35.

<sup>321</sup> This very move was Hitler's self-protective psychological strategy in mocking the success of the black Olympians. See LARGE *supra* note 4 and accompanying text.

Test-bashing without question also has a higher-order salutary effect. We are a society obsessed by tests and rankings; in particular we give altogether too much power to US News & World Report's ranking of academic institutions. And we know it. Absolutely no one holds that test scores and rankings should be the basic measure of educational quality, for institutions or for students. Nevertheless, speaking about elite high schools, the New York Times recently described an epidemic of pill popping of uppers before tests among students looking for an edge in concentration. Students reportedly do this to increase their chances of getting into the "right" college.<sup>322</sup> It is hard to blame the students. Globalization and the market collapses of the last few years have made life hard for the young.

Yet if Americans give tests too much weight, it is almost surely at least in large measure, because we love data, from baseball cybermetrics and Moneyball<sup>323</sup> to Wall Street earnings estimates, to Ms. America and Oscar rankings. By invoking race, test critics go too far. That our tests are imperfect should be understood to mean only that (a) human beings are flawed and their intellectual products, tests in this case, are no less flawed, and (b) in an environment constantly contested by charges of racism and favoritism of all kinds, objective tests are, well, objective.<sup>324</sup>

Redirecting broad-based frustration at tests may not be the best response to poor test results, so let us test the anti-testing movement in another way. Although concerned that African Americans pass the entire C.P.A. exam the first time at a rate of only four percent, half the rate of others,<sup>325</sup> and make up only a small fraction of the nation's certified public accountants, professional educators have called for the

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<sup>322</sup> Alan Schwarz, *Risky Rise of the Good-Grade Pill*, N.Y. TIMES, July 1, 2012, at A17.

<sup>323</sup> See MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003). Lewis showed that by cleverly using baseball data the Oakland Athletics could beat the New York Yankees who had a payroll three times as large. Moneyball was subsequently made into a successful movie starring Brad Pitt. See *Moneyball* (Sony Pictures 2011).

<sup>324</sup> How, one wonders, could a young white candidate for employment not worry about favoritism when employment ads "especially welcome applications by minorities"?

<sup>325</sup> See Quinton Booker, *African-American Candidates for the CPA Exam: Perspectives and Performance*, CERTIFIED PUB. ACCT. J., Aug. 2003, at 55.

mentoring of black students.<sup>326</sup> No movement seems afoot, however small, to change the C.P.A. exam or loosen the passing standards, much less to abolish the exam.<sup>327</sup> The same, as far as I have been able to determine, can be said of medical licensing exams. Knowledge, leaders in accounting and medical education know, is power.

What the critique of knowledge does, in addition to undermining the pursuit of knowledge among our youth, is to subvert any alliance between idealistic test critics and others who desperately want the black community to succeed—but who cannot be persuaded, however much test critics may devalue intellectual achievement,<sup>328</sup> that ignorance has no moral or economic consequences. Is anything more pellucid than that no matter how ugly they may be, generalizations, *i.e.*, stereotypes, endure for as long as their foundations endure? If teens have 20% more accidents than seniors per mile driven, then the public will conclude that that seniors tend to drive more carefully. If human beings did not generalize, we would still be living in caves. Regarding the disparities in question here, all the hand-wringing, breast-beating, tooth-gnashing, and charges of racism are for naught.

You don't have to be white to agree. Writes Shelby Steele, by no means a testocrat:

There is no full equality for any group that is not educationally and economically competitive . . . . [We] must internalize a devotion to academic and economic excellence that is *not contingent on what we might or might not get from the larger society* . . . . I do not believe that minorities will ever have true respect for any reform that does not demand as much or more from them as from others.<sup>329</sup>

To the extent that Christopher Jencks and Meredith Philips are right about the connection between reducing the black-white test score

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<sup>326</sup> The overall first-time pass rate appears to be 7.8%. See NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY, CANDIDATE PERFORMANCE ON THE UNIFORM CPA EXAMINATION (2009 edition), at 6, table 2.

<sup>327</sup> Nor apparently were complaints voiced when the profession was adding coursework required for the certificate. See, e.g., James Lloyd Bierstaker, Martha A. Howe, & Inshik Seol, *The Effect of the 150-Credit-Hour Requirement of the Certified Public Accounting (CPA) Exam on the Career Intentions of Women and Minorities*, J. OF EDUC. FOR BUS., 99 Nov./Dec. (2005) (showing the 4% datum). See also Booker, *supra* note 325, at 55. Are CPAs too timid or culturally unsophisticated to raise their voices? Or do lawyers go off half-cocked?

<sup>328</sup> See MCWHORTER, *supra* note 292 and accompanying text.

<sup>329</sup> STEELE, *supra* note 319, at 108, 113 (1998) (italics in original).

gap and differences ‘in crime, health and family structure,’<sup>330</sup> is the attack on intellectual values not especially dangerous? Moreover, if whites, still the majority race, come to believe that the black community is not only failing to close the gap but, bashing tests, is not even interested in doing so, why should they not fight until the very end for their seats in law school? Beyond that, if black youngsters remain in the back of the educational bus at even our best schools, what hope is there for an integrated, cohesive, mutually respecting, and maybe even loving multiethnic society?

Every individual and every group needs a dose of self-delusion to survive, if only for the purpose of screwing up its courage in difficult times. But if it is important to speak truth to power, it is no less so to speak truth to the *powerless*. That there is no progress without truth is a proposition understood at least since Roman times and now an article of faith that has reached the far ends of the earth.<sup>331</sup>

As for testing, consider what might be possible if knowledge was honored but race were still understood to be an unresolved problem in American life. We could debate, for example, whether testing is more important for some occupations than for others and, indeed, whether racial identity should be controlling in some cases. Take policing: it is not unreasonable to think, given the historic distrust of police in the African American community, that tests should play less of a role in selection of police—and one could take the same position with respect to firefighters.

A calmer discursive environment might also allow us to consider: What, if anything, is different about the nature of technical knowledge required of a firefighter compared to that required of a lawyer, physicist, mathematician, doctor, chemist, or engineer?; Are tests meaningless in all these fields because they have not been sufficiently

<sup>330</sup> See JENCKS & PHILLIPS, *supra* note 59 and accompanying text.

<sup>331</sup> See MARCUS TULLIUS CICERO, DE OFFICIIS bk. III sec. 17 (Walter Miller ed., Harvard University Press 1913) (44 B.C.E.). Cicero’s text, slightly emended, is the motto of the Christchurch, New Zealand, newspaper, “The Press”: *Nihil utile quod non honestum* (literally, nothing is useful that is not honest). See CHRISTCHURCH CITY LIBRARIES, <http://christchurchcitylibraries.com/Collections/Newspapers/Historical/NewZealand/> (last visited Apr. 6, 2013). Identity theorists do not always sign on to the message. “[M]y goal is not to deliver the truth but to inspire social change.” JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 244 (2000). For a full discussion about manipulative discourse in the area of race and gender, see generally SUBOTNIK, *supra* note 246, and RICHARD T. FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE (2008).

validated, or because they require memorization rather than understanding?;<sup>332</sup> Or because they do not assess research and communication skills?; If scientists and others can create meaningful tests of technical materials, why not lawyers?; And, finally, would the public be better served with testing that allowed for different levels of certification in the legal profession, as is the case in medicine?<sup>333</sup> All-or-nothing thinking precludes such inquiries.

Thinking out of the box raises the possibility of a completely different change for the bar exam from the ones proposed above and shows that, for test critics, things could be much worse. As we have seen, the ABA standard for bar passage is only whether the candidate has “minimum competence” to practice law.<sup>334</sup> But why should we be satisfied with less than a robust measure of *how much* the candidate knows? Grades of graduating doctors on the U.S. Medical Licensing Exams, the bar exam analogue, are routinely released to hospitals so that they can evaluate applicants for residencies.<sup>335</sup> Is it conceivable that law firms would not want such bar score information? SALT would of course strenuously oppose a regime which provides such information on bar takers. But that does not make disclosure wrong.

Of course, the devaluation of learning by test critics has implications for much more than licensing. It undermines efforts to deal with the real problems in our communities and schools, the wide knowledge gap that neither Title VII nor affirmative action can narrow. Here is where the struggle for equality and community must be won. Eyes on the prize.

As for the LSAT, abandoning it presents a tricky problem, because the LSAT is the best current predictor of law school grades. Should grades, like tests, not matter because *gradism* and *test-scorism* are the (im)moral equivalents of racism? Perhaps we can put this issue to bed by assessing the credibility of the relevant stakeholders. So query: Who should fair-minded observers trust as to the importance of grades,

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<sup>332</sup> Analysis of bar exam utility is unfortunately corrupted by arguments that exam takers should not have to “memoriz[e] and regurgitat[e]”—presumably because they can always look up—a rule, such as to be binding a promise usually requires consideration. See Kristen Booth Glen, *supra* note 281, at 1727.

<sup>333</sup> No one presumably wants a certification system that demands less of those serving minority communities.

<sup>334</sup> See *supra* note 205, and accompanying text.

<sup>335</sup> See Michael B. Edmond et al., *Racial Bias in Using USMLE Step 1 Scores to Grant Internal Medicine Residency Interviews*, 12 ACADEMIC MEDICINE 1253, 1254 (2001).

employers who have their livelihoods at stake in highly competitive markets? Or SALT, whose members, protected in their ivory tower, risk nothing?

Regarding *Ricci*, we should recall that both parties claimed *civil rights* violations, New Haven claiming that it could not certify the results of the test because it would open itself up to challenge on the grounds of disparate impact and the plaintiff firefighters claiming that not certifying the test would be a civil rights violation itself on the grounds of disparate treatment. Whose civil rights case is stronger when plaintiffs did nothing wrong, the minority firefighters could have studied harder, and New Haven invalidated its own test *post hoc*?

The point is that the disparate impact on immediately affected individuals is often ignored; the baseline position for *Ricci* critics is group preferences.<sup>336</sup> America, however, can survive only as one society. While every community has latitude to create the test that it wants, all of us also have responsibilities to one another. Mr. Ricci, as the Supreme Court saw, satisfied conditions posted by the organizers of the event. The red carpet that the Court rolled out *for* him was needed to replace the rug that had been pulled out *from* under him. In short, Frank Ricci had to win as a matter of *simple*—if not social—justice.

For readers not yet persuaded as to this conclusion, a classic utilitarian measure may help: “the greatest happiness for the most people”—and this does not mean that since there are more white than black people in America, white wins. In fact, let us forget about numbers of people and concentrate on the *quality* of their happiness; call it a hedonic test. We have seen how white New Haven responded to the *Ricci* decision, which restored the victory felt to have been snatched from the white firefighters.<sup>337</sup> Would black New Haven have felt the same exhilaration if their city had won? Unlikely, I think.

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<sup>336</sup> Consider the New York Times editorial published the day after the recent *Fisher v. Texas* oral argument before the U.S. Supreme Court. The Times phrases the issue this way: “Does the Constitution permit race-conscious programs that provide minorities with opportunities, even though it prohibits programs that exclude minorities because of their race?” Editorial, *Race-Conscious Admission in Texas*, N.Y. TIMES, Oct. 11, 2012, at A30. Who wants to deny opportunities to anyone, much less to minorities? A more honest, and no less technically correct, presentation of the issue that did not ignore the plaintiff would have been whether “providing minorities with opportunities” wrongly deprived Ms. Fisher of her opportunities because of *her* race.

<sup>337</sup> See Mahoney, *supra* note 26.

To be sure, such a decision would have found some favor in the black community, especially among minority firefighters—and not only because it would have been a victory for the team. President Lyndon Johnson famously and rightly said that, “You don’t take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race, saying, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”<sup>338</sup> Any handicap-based victory, however, has to be ultimately unsatisfying to beneficiaries.

One need not agree with Shelby Steele that the “fact that some do not have the same chance to develop excellence is *not* an argument against excellence.”<sup>339</sup> Nor does one have to agree with the plain-speaking and inimitable Stanley Crouch, for whom head-to-head competition between blacks and whites is important:

We all deny that tradition of hard-won achievement whenever our conciliatory cowardice gets the best of us and we treat black people like children who shouldn’t be asked to meet the standards that the best of all Americans have met . . . . We aren’t supposed to have any standards because standards were developed as forms of exclusion and oppression.<sup>340</sup>

My point is that the black firefighters in question must have thought that they could win the race *as constituted* or else they would have raised their concerns beforehand. A decision for the City thus could hardly have summoned up the famous moments of transcendence in Jesse Owens’s life—or for that matter, in the lives of Jack Johnson, Joe Louis, Marian Anderson, Jackie Robinson, Rosa Parks, Martin Luther King, Jr., Thurgood Marshall, Toni Morrison, Michael Jordan, and most recently, Barack Obama. These individuals thrilled and inspired the black community—and many other Americans—by beating white folks at their own game or in their own venue. Celebrating a Frank Ricci loss would have affirmed only the proposition that paper and No. 2 pencil tests are chains that black people cannot break. Is the hedonic test also invalid?

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<sup>338</sup> President Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

<sup>339</sup> See STEELE, *supra* note 319, at 87. Steele goes on to say that the problem of those without sufficient training “is not solved by denouncing standards.” *Id.*

<sup>340</sup> See CROUCH, *supra* note 116, at 44 and xv.